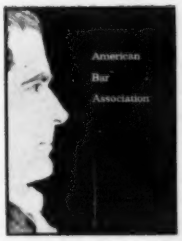
American Bar Association Journal

AUGUST 1955 • Volume 41 • Number 8



This Month's Cover

John Marshall (1755–1835) is the subject of our sixth cover in the current series. Commemorative ceremonies marking the two hundredth anniversary of the birth of this distinguished American will take place at the Annual Meeting of the American Bar Association in Philadelphia on August 24, with the President of the United States as the principal speaker. Marshall served as Chief Justice of the United States from 1801 to 1835. His illustrious career is vividly sketched in this issue by Chief Justice Earl Warren and Douglas H. Gordon, of the Maryland Bar. Line drawing by Charles W. Moser.

August, 1955

THE AMERICAN BAR ASSOCIATION JOURNAL is published monthly by the AMERICAN BAR ASSOCIATION at 1155 East Sixtieth Street, Chicago 37, Illinois
Entered as second class matter August 25, 1920, at the Post Office at Chicago, Illinois, under the act of August 24, 1912.
Price per copy, 75¢; to Members, 50¢; per year, $5.00; to Members, $2.50; to Students in Law Schools, $3.00;
to Members of the American Law Student Association, $1.50.
Vol 41. No. 8. Changes of address must reach the JOURNAL office five weeks in advance of the next issue date. Be sure to give both old and new addresses.

The President's Page

Loyd Wright

▪ When this, my last opportunity to address you through the medium of the "President's Page", appears in print I will have been in office going well into my twelfth month. For the honor and privilege of being your President during this last, interesting and trying year, I shall ever remain deeply grateful; to those of you throughout this glorious country of ours with whom it has been my privilege to become better acquainted and who have extended to Mrs. Wright and to me so many gracious courtesies, I give thanks from the bottom of my heart.

Whatever resources of time, energy or physical well-being your President expends during his year of service are many times compensated by the unusual opportunity to meet the "craft" throughout the land. We can indeed be proud of our profession!

This year has seen the culmination of years of effort and leadership of our Association in many particulars: the victory to gain "fair" compensation for our federal judiciary and the Congress; the acceleration of state programs to more realistically deal with the selection, compensation and tenure of state judges; the extension of regional meeting programs so that many more thousands may avail themselves of our "workshop" method of continuing education; our Public Relations Committee's motion picture "Dedication to Justice"; the universal acceptance by state and local bar associations of our help in assisting them in solving their problems and instigating and stimulating their programs; the wholehearted and intelligent support given the American Bar Association on the occasions when assistance was needed to implement in the legislative halls action taken by the House of Delegates or the Board of Governors; the splendid work being done by our associated American Bar Foundation in research and the advancement of its undertakings; the startling acceptance and successful launching of Bill Mason's "insurance dream"; and the growing complete acceptance of our Traffic Court Program are but a few of the accomplishments which, like all harvests, mature after years of planting and constant weeding and cultivating—we have reaped this year.

We have attained our greatest numerical growth in our history and today have more members in every category than ever before. We are marching forward in this "era of service" to which we have dedicated ourselves and will continue to prosper, grow and wield wholesome influence so long as our objectives and motives are consonant with our preferred status as "officers of the court" and we adhere to true concepts of professional service and dedication to constitutional concepts of government. "Liberty Under Law"—"Government by Law" as opposed to "Government by Men"—shall forever be the yardstick of our great heritage.

As the number of our profession increases (now 241,000), our responsibilities increase. I feel very definitely that our professional competence is increasing yearly because of our numerous programs touching all phases of post- and ante-admission education.

Bear in mind, however, that our first purpose is "to uphold the United States Constitution and preserve representative government". This is as much our duty and responsibility as to competently handle a client's cause. Once more only by cleaving to fundamental principles and being rightfully articulate can we fulfill our obligations as lawyers and citizens. There is, in this atomic age, no room for hyphenated Americans or lawyers! It makes no difference, in my opinion, whether the hyphen is caused by loyalty to a political party or a dogma of any character whatever, if its intervening influence is to subvert loyalty to the nation and to our form of representative government to other controlling influences. In my humble opinion the survival of our form of government—perhaps it is more accurate to say the "revival of our constitutional form of government"—depends upon how the lawyers of the nation withstand "expedient pressures" and firm up to fundamental concepts. Individual liberty and paternalist government are a long way from being synonomous.

(Continued on page 689)

American Bar Association Journal

the official organ of the

AMERICAN BAR ASSOCIATION

published monthly

The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote the administration of justice and the uniformity of legislation and of judicial decisions throughout the nation; to uphold the honor of the profession of law; to apply its knowledge and experience in the field of the law to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote such activities of the Bar organizations in the nation and in the respective states as are within these objects, in the interest of the legal profession and of the public. Through representation of state, territory and local bar associations in the House of Delegates of the Association, as well as large membership from the Bar of each state and territory, the Association endeavors to reflect, so far as possible, the objectives of the organized Bar of the United States.

There are seventeen Sections for carrying on the work of the Association, each within the jurisdiction defined by its by-laws, as follows: Administrative Law; Antitrust Law; Bar Activities; Corporation, Banking and Business Law; Criminal Law; Insurance Law; International and Comparative Law; Judicial Administration; Labor Relations Law; Legal Education and Admissions to the Bar; Mineral Law; Municipal Law; Patent, Trade-Mark and Copyright Law; Public Utility Law; Real Property, Probate and Trust Law; Taxation; and the Junior Bar Conference. Some issue special publications in their respective fields. Membership in the Junior Bar Conference is limited to members of the Association under the age of 36, who are automatically enrolled therein upon their election to membership in the Association. All members of the Association are eligible for membership in any of the other Sections.

Any person who is a member in good standing of the Bar of any state or territory of the United States, or of any of the territorial groups, or of any federal, state or territorial court of record, is eligible to membership in the Association on endorsement, nomination and election. Applications for membership require the endorsement of a member of the Association in good standing and are considered in each case by a Committee on Admissions of the appropriate state. If the applicant is a member of the Bar of the state or territory in which he resides or has his principal office, or is a member of a federal, state or territorial court of record of a state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of such states or territories. If, however, the applicant is not a member of the Bar of the state or territory in which he resides or has his principal office, the application is referred to the Committee on Admissions for one of those states or territories or is referred to the Committee on Admissions for a state or territory in which the applicant formerly resided and to the Bar of which he was admitted. Upon the approval of an application by a majority of the proper Committee on Admissions, an applicant is deemed nominated for membership. All nominations made pursuant to these provisions are reported to the Board of Governors for election. Four negative votes in the Board of Governors prevent an applicant's election.

Dues are $16.00 a year, except for the first two years after an applicant's admission to the Bar, the dues are $4.00 per year, and for three years thereafter $8.00 per year, each of which includes the subscription price of the JOURNAL. There are no additional dues for membership in the Junior Bar Conference. Dues for the other Sections are as follows: Administrative Law, $5.00; Antitrust Law, $5.00; Bar Activities, $2.00; Corporation, Banking and Business Law, $3.00; Criminal Law, $2.00; Insurance Law, $5.00; International and Comparative Law, $3.00; Judicial Administration, $3.00; Labor Relations Law, $6.00; Mineral Law, $5.00; Municipal Law, $3.00; Patent, Trade-Mark and Copyright Law, $5.00; Public Utility Law, $3.00; Real Property, Probate and Trust Law, $3.00; Taxation, $6.00.

Blank forms of proposal for membership may be obtained from the Association offices at 1155 East Sixtieth Street, Chicago 37, Illinois.

American Bar Association

HEADQUARTERS OFFICE, 1155 EAST SIXTIETH STREET, CHICAGO 37, ILLINOIS
WASHINGTON OFFICE, 1406 M STREET, N. W., WASHINGTON 5, D. C.

Officers and Board of Governors 1954-55

President LOYD WRIGHT, 111 West Seventh Street, Los Angeles 14, California
Chairman, House of Delegates, JOHN D. RANDALL, American Building, Cedar Rapids, Iowa
Secretary JOSEPH D. STECHER, Toledo Trust Building, Toledo 4, Ohio
Treasurer HAROLD H. BREDELL, Consolidated Building, Indianapolis 4, Indiana
Assistant Secretary JOSEPH D. CALHOUN, 218 West Front Street, Media, Pennsylvania

Ex Officio
- The President,
- The Chairman of the House of Delegates,
- The Secretary,
- The Treasurer,
- WILLIAM J. JAMESON, Last Retiring President, Electric Building, Billings, Montana
- TAPPAN GREGORY, Editor-in-Chief, *American Bar Association Journal,* 105 South LaSalle Street, Chicago 3, Illinois

First Circuit	ELWOOD H. HETTRICK, 11 Ashburton Place, Boston 8, Massachusetts	*Sixth Circuit*	BLAKEY HELM, M. E. Taylor Building, Louisville 2, Kentucky
Second Circuit	OSMER C. FITTS, 16 High Street, Brattleboro, Vermont	*Seventh Circuit*	RICHARD P. TINKHAM, Calumet Building, Hammond, Indiana
Third Circuit	P.WARREN GREEN, Public Building, Wilmington, Delaware	*Eighth Circuit*	HERBERT G. NILLES, Black Building, Fargo, North Dakota
*Fourth Circuit**	ROBERT T. BARTON, JR., Mutual Building, Richmond 19, Virginia	*Ninth Circuit*	A. L. MERRILL, Carlson Building, Pocatello, Idaho
Fifth Circuit	LEDOUX R. PROVOSTY, Guaranty Bank and Trust Company Building, Alexandria 1, Louisiana	*Tenth Circuit*	THOMAS M. BURGESS, Mining Exchange Building, Colorado Springs, Colorado

**The District of Columbia Circuit is considered a part of the Fourth Circuit for the purposes of the Board of Governors.*

Board of Editors, American Bar Association Journal, listed on page 724

Advisory Board of the Journal

WALTER P. ARMSTRONG, JR.	Memphis, Tennessee	JOHN H. MAHON	Lewiston, Maine
REX G. BAKER	Houston, Texas	A. L. MERRILL	Pocatello, Idaho
CUTHBERT S. BALDWIN	New Orleans, Louisiana	FREDERIC M. MILLER	Des Moines, Iowa
HOWARD L. BARKDULL	Cleveland, Ohio	MORRIS B. MITCHELL	Minneapolis, Minnesota
WALTER M. BASTIAN	Washington, D. C.	B. ALLSTON MOORE	Charleston, South Carolina
E. DIXIE BEGGS	Pensacola, Florida	R. DEAN MOORHEAD	Austin, Texas
F. W. BEUTLER	Taos, New Mexico	EMORY H. NILES	Baltimore, Maryland
JAMES E. BRENNER	Stanford, California	HERBERT G. NILLES	Fargo, North Dakota
ROY A. BRONSON	San Francisco, California	EDWIN M. OTTERBOURG	New York, New York
JOHN G. BUCHANAN	Pittsburgh, Pennsylvania	D. RAY OWEN, JR.	Salt Lake City, Utah
THOMAS M. BURGESS	Colorado Springs, Colorado	KURT F. PANTZER	Indianapolis, Indiana
DWIGHT CAMPBELL	Aberdeen, South Dakota	FRANKLIN E. PARKER, JR.	New York, New York
STUART B. CAMPBELL	Wytheville, Virginia	JOHN J. PARKER	Charlotte, North Carolina
CYRIL COLEMAN	Hartford, Connecticut	WILLIAM POOLE	Wilmington, Delaware
HARRY W. COLMERY	Topeka, Kansas	HAROLD L. REEVE	Chicago, Illinois
WALTER E. CRAIG	Phoenix, Arizona	WARREN H. RESH	Madison, Wisconsin
MARTIN J. DINKELSPIEL	San Francisco, California	CHARLES S. RHYNE	Washington, D. C.
JAMES M. DOUGLAS	St. Louis, Missouri	JOHN C. SATTERFIELD	Jackson, Mississippi
OSMER C. FITTS	Brattleboro, Vermont	WHITNEY NORTH SEYMOUR	New York, New York
E. SMYTHE GAMBRELL	Atlanta, Georgia	REGINALD HEBER SMITH	Boston, Massachusetts
HENRY C. HART	Providence, Rhode Island	ROBERT G. STOREY	Dallas, Texas
BLAKEY HELM	Louisville, Kentucky	LESTER D. SUMMERFIELD	Reno, Nevada
ALLAN H. W. HIGGINS	Boston, Massachusetts	THOMAS TODD	Seattle, Washington
MANLEY O. HUDSON	Cambridge, Massachusetts	A. W. TRICE	Ada, Oklahoma
WILLIAM J. JAMESON	Billings, Montana	GEORGE H. TURNER	Lincoln, Nebraska
CHARLES W. JOINER	Ann Arbor, Michigan	HARRISON TWEED	New York, New York
H. GLENN KINSLEY	Sheridan, Wyoming	ROBERT W. UPTON	Concord, New Hampshire
EMMET M. LaRUE	Rensselaer, Indiana	ARTHUR T. VANDERBILT	Newark, New Jersey
L. DUNCAN LLOYD	Chicago, Illinois	EDWARD L. WRIGHT	Little Rock, Arkansas
ROBERT F. MAGUIRE	Portland, Oregon		

Views of Our Readers

■ **Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the Journal or otherwise within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves the selection of communications which it will publish and may reject because of length. The Board is not responsible for matters stated or views expressed in any communication.**

A Perfect Definition of the Natural Law

■ I have read with increasing uneasiness over the past few years the articles in the JOURNAL espousing the views of the advocates of "natural" versus "positive" law.

Justice Holmes has been depicted in contrasting views as an atheistic monster, and as an advanced moralist, and legal philosophers from Cicero to Pound have been called as witnesses.

To my great delight, I have just read Professor George W. Goble's "Nature, Man and Law" in the May, 1955, issue of the JOURNAL! If Professor Goble has not said the last word on the subject, he has at least made very clear what has been very implicit all along, *i.e.*, that the quarrel has been semantic rather than real. The blind men who described their impressions of the elephant had no more valid dispute than the advocates of "Natural" and of "Positive" law. I believe it was Socrates who said, "with perfect definition, all argument ceases".

It should now be apparent to all that the opposing groups have been all the while talking about two entirely different things, *viz.*, "is" versus "ought".

Professor Goble has furnished the "perfect definition" which should end the argument.

JESSE E. MARSHALL

Sioux City, Iowa

A Dissent on the Natural Law Article

■ Your editorial note preceding the article on "Nature, Man and Law: The True Natural Law" says:

> Professor Goble here shows that our knowledge of science and the history of the moral evolution of man refute the idea that "natural law" in the classical sense exists; that is, that the idea of classical "natural law" itself is unnatural and wholly man-made. . . .

I don't think so! And I believe many will join in my dissent.

When I saw the discussion in the JOURNAL I was reminded of the remark of the female monkey who, (so the story goes) when she received advances from her male companion after the H-bomb had blown mankind off the earth, repulsed him with the words, "Now, why start that all over again?"

If Professor Goble and the writer of the head note wish to attribute all their moral insights and their conscience to the stone-age man who first declined to bash in the face of his neighboring cave dweller, I suppose they must be allowed to do so. But I trust they will allow some of the rest of us to believe that our moral insights and conscience come from the same power that created the universe.

Professor Goble charges the Inquisition, the imprisonment of Galileo and the burning of Bruno to the "God-fearing people who were so certain of their own rectitude and morality". But he fails to note that "the comparatively recent condemnation of millions of innocent people to death in gas chambers, to imprisonment in slave labor camps and to banishment in the salt mines" was perpetrated by men who scoffed at natural law and moral law. If I found my views at one with the views of such brutish men and at variance from the opinions of the great Hebrew prophets, the great Greek philosophers, the great Roman jurists, the great Scholastic writers, all the saints and martyrs of the Christian church and the inspired founders of our own blessed country, I should stop and take another look at the subject, and humbly pray for clear understanding.

No one can deny that experience affects the law. But for the most part its function is discovery, not creation. As Dean Pound says, the law is reason tested by experience. Whence the capacity for experience and reason?

As for the controversy about Justice Holmes, that was determined ten or more years ago by an incisive observation in an editorial in *Life Magazine* which said that while Holmes stated that he did not believe in natural law, he always acted as if he did. The reference by the honored Justice to his impelling motives as "can't help" does not change their character as laws of his nature. And at this point Mr. Goble seems to concede that the discussion is nothing more than dialectics.

So we are impelled to an acceptance of the advice of the old man who said, "Don't argue! Argument is always won by the man who talks the loudest and longest!" It may be true that, "No soul was ever saved by argument," but I believe the JOURNAL does the profession a disservice when it assists in misleading the innocent into the error of modern subjectivism and sophistry.

ROBERT N. WILKIN

United States District Court
Washington, D. C.

Black Is White— Mr. Goble and Natural Law

■ Permit me most vehemently to protest against the publication in the JOURNAL for May under the title of "The True Natural Law" the article by Professor Goble wherein he undertakes to substitute an entirely new concept for what over the centuries has been known as the natural law.

I am not now objecting to the article itself, although it does seem to me to be an expression of neo-paganism which characterizes much of our current thinking. What I protest against is the fact that the JOURNAL should permit it to appear under what is unquestionably a title chosen by someone through the Humpty-Dumpty technique—"When I use a word . . . it means just what I choose it to mean—neither more nor less."

Until recent years, the words *natural law* have represented an old and universally recognized concept. This concept has always been understood as involving certain absolutes. Whatever its norms may have been thought to be, they have always been objective and not subjective. Professor Goble completely reverses this concept and attempts to fortify his reversal by adding the word "true". There is no practice more likely to confuse the thinking of mankind than that of attributing to words with long established meanings a significance which is the opposite of what they have acquired.

If Professor Goble wishes to propose the existence of subjective norms of conduct, that, of course, is his privilege, but it seems to me that it is the duty of a responsible periodical like the JOURNAL to insist that the proposal be labeled for what it is and not permit the proposition to be insinuated into our thinking by appropriating words that have long stood for an antithetical idea.

Let us not permit the editorial chair of the AMERICAN BAR ASSOCIATION JOURNAL to become a seat for the most subtle means of subverting our Western civilization. If a contributor wishes to beguile his readers into accepting his proposition that black is really white, let not the JOURNAL publish it under a title which boldly uses the word "white" to mean "black".

WILLIAM GILLIGAN
New York, New York

The "Proper Understanding" of the Natural Law

■ In your May issue you introduce your lead article, "Nature, Man and Law: The True Natural Law" by stating that Professor Goble shows therein "that our knowledge of science and the history of the moral evolution of man refute the idea that 'natural law' in the classical sense exists; that is, that the idea of classical 'natural law' itself is unnatural and wholly man-made."

There is evidently some confusion as to what is meant by the term "classical" natural law doctrine. Great variance exists between the legal-political-philosophical concepts of Sir Edward Coke and natural law

in the highly flexible tradition of Plato, Aristotle and Thomas Aquinas. Generally historians of philosophy and political science reserve "classical" as an appellation for the latter tradition and not for the parochial views of Coke who occasionally appeared to equate natural law with the particular rules of common law prevailing in England at his time. Coke did in fact borrow from Hooker some of the language and rationale of classical natural law, but he began the conversion of "natural law" into a series of particularized, concretized, "natural rights" to block the king's efforts to stretch the royal prerogative.

Today it seems to be chiefly lawyers who still refer to Coke's idea of natural law as "classical", perhaps because the interest of many lawyers in classical natural law is limited to the form, however bastardized, in which it had its most dramatic impact on the development of common law. Coke might be regarded as representing the classical age of common law but certainly not as a faithful representative of the classical tradition of natural law philosophy.

Professor Goble quotes Dean Pound as saying in 1923: "According to the classical natural-law theory, all positive law, *i.e.*, the whole body of legal precepts that furnish the grounds of actual decision in the courts is but a more or less feeble reflection of an ideal body of perfect rules, demonstrable by reason and valid for all times, all places and all men." Pound's original context of this quotation clearly limits this reference to "the natural-law thinking of the seventeenth and eighteenth centuries", namely to Coke and his followers. Pound presumably is well aware of the divergence between Coke and Plato, although here he has followed the lawyer's casual practice of referring to Coke as "classical". Professor Goble, however, apparently fails to distinguish the two since his same paragraph quoting Pound's description of seventeenth century natural law theory, also cites Cicero as a noted exponent of the same "classical" philosophy of natural law. Cicero was an imitator of Plato and, as such, a classicist in the proper sense. I believe Professor Goble would be hard pressed to discover in Cicero's *De Re Publica* or *De Legibus* any expression closely resembling the theory attributed by Pound to the seventeenth-century lawyers.

We agree with Professor Goble that it is absurd to claim the existence of any ideal body of specific rules tailored in detail to fit particular, concrete situations, which would be valid for all times, all places and all men. No such notion was ever held by the great exponents of the classical theory of natural law. It is quite another thing to assert the objective validity of general, fundamental principles of justice and morality against which all human conduct and law may be measured under all circumstances and in all times. The classical theory is that these principles are revealed by immutable basic elements or traits inherent in human nature and human life. The investigation of natural law in terms of the classical school, therefore, involves the study of man, historically and psychologically, and a weighing and evaluation of his basic drives and their consequences for good or evil. It involves, among oth-

er things, a study in long-range expediency or as Professor Leo Strauss has called it, a "critique of hedonism". However, the classicists would transcend the selfish interest of isolated individuals and look to individual good in the context of the public good. Many, particularly the Christians, likewise call on teleology or the theological end of man to support their conclusions.

Curiously enough, the practical implementation of this classical view of natural law comes very close to what Professor Goble himself posits as the methodology of what he terms "the true natural law". Thus he says:

> The grand strategy for man's discovery of truth seems to be . . . by means of effort, of trial and error, experimentation, research, thinking, meditation, worship and the intercommunication of ideas and feelings among all men everywhere and over many thousands of years of time.

However, Professor Goble goes on to say: "That which results from the accumulated experience and insights of all men comprising the human race at any given time is likely to be the nearest approach to truth." This seems to be equating truth to social convention or assent rather than to any norm of objective validity. He cites Holmes: "The best test of truth is the power of the thought to get itself accepted in the competition of the market place." Actually a community's popular sense of morality would seldom come as close to the truth as the views of its individual members who excel in the classic virtues of wisdom, moderation, justice and courage. Argument from authority might better refer to such individuals rather than to popular opinion, although history shows that such men do not always prevail in the market place. Holmes can invoke the public sense of justice in Anglo-American society as the ultimate criterion of right and wrong without patent implausibility, because that sense today derives largely from Judeo-Christian and classical principles. The same cannot be said for the mores of all societies today. It is probably due largely to this fact that many philosophers of positivist orientation have during the past twenty years been turning again to the classical thesis for inspiration.

The scope of this letter scarcely permits any more discussion of natural law. Mention might be made of Walter Lippmann's new book, *The Public Philosophy*, and Professor Leo Strauss' more profound but likewise much more difficult *Natural Right and History*. I rather suspect that Professor Goble is somewhat closer in spirit to the classical philosophy of natural law, properly understood, than he himself imagines.

R. V. CARPENTER

Loyola University
School of Law
Chicago, Illinois

Natural Science, Natural Law: He Prefers Science

■ Professor Goble's article, "Nature, Man and Law", was evidently a carefully prepared attack on the theory of natural law. His discussion of modern scientific thought was very clear. However, natural law theorists will probably remain unimpressed. They cannot understand that scientific progress results from the successful blending of a spirit of insatiable curiosity about the unknown, with the full force of empirical reasoning. Science stands for the proposition that no theory, or idea is so sacred, that it cannot be rejected enthusiastically in favor of its antithesis whenever experimental evidence justifies such a course. Modern science has learned its lesson from history. Certitude has too often caused it embarrassment in the past. Therefore, there can never be an end to man's study of the world of external phenomena. The production of new horizons by each new scientific discovery means a never ending search for the hidden secrets of a universe without permanence or stability.

Of course an immutable natural law to which man in his behavior, ought to adhere, cannot exist. Science postulates change. If science dare not produce final answers, and no other method of investigation is trustworthy, the existence of such a law is moot, and we might just as well ignore it.

But history reminds us that the believers in a natural law cannot be considered as just another group of innocuous philosophers. Such people have of course fashioned a so-called natural law out of their own personal passions and prejudices. Whenever they gain control of society they inevitably tend to foster tyranny and persecution of dissident minorities.

The future will no doubt diminish the appeal of natural law theories. Society if it is to progress must eliminate such dangerous ideas. Eventually our social sciences will devise means to eradicate such unscientific notions by the proper education, and at that time all men will embrace the one true philosophy of science.

ROBERT J. DREXLER

Oklahoma City, Oklahoma

(Continued on page 684)

(Continued from page 682)

From Another Admirer of Professor Goble

■ The JOURNAL is always good, but sometimes it is better than that.

In my opinion such is the May issue, and that magnificent article, "Nature, Man and Law" by Professor Goble, which I started to read as one would the leading article in a publication, but which I read twice before I put down the JOURNAL. I was surprised to discover that I had spent my entire evening until quite late reading slowly—and if it is possible for me to do so—thoughtfully.

This morning during a recess I inquired of attorneys in a trial if they were members of the American Bar Association. I found that two were not. I promptly put applications into their hands and told them that I did not know of any better thing for them to do than to join and to read the JOURNAL, and I assured them I did not know of any other publication that was more valuable for an attorney, and especially a young attorney who is but a short time out of law school, to read.

I found two of the attorneys very receptive to the suggestion and I have sent for a few more applications, and intend to keep them conveniently available.

JAMES H. POPE

Municipal Court
Los Angeles, California

A Footnote to the Review of the Johnson Biography

■ Since submitting my review of Professor Donald G. Morgan's *Justice William Johnson: The First Dissenter* (April, 1955, issue), I have learned that the author is totally blind. I thought that fact might be of interest to the readers of the JOURNAL, inasmuch as Professor Morgan, of Mount Holyoke College, is another of those miraculous individuals who, like Professor Samuel J. Konefsky, of Brooklyn College, the author of well-known works on the late Mr. Justice Stone and Mr. Justice Frankfurter, is able to overcome the serious handicap of blindness. Both are highly respected and effective teachers in their respective institutions.

It is all the more remarkable when one considers that Professor Morgan, in order to complete so thorough a work, as he did on Justice Johnson, had to pore through dusty old court records and scattered library material, as well as old newspapers. Examples of this sort are heartening to us all.

LESTER E. DENONN

New York, New York

The JOURNAL Abroad—Naturally, We're Pleased

■ The continuation of the series of articles discussing the Fifth Amendment in the JOURNAL's April issue revived memory of a pleasant, personal observation. It is illustrative of the JOURNAL's unheralded service in contributing towards improved overseas relations.

Last summer I was privileged to attend The Hague Academy of International Law. The students' lounge contained leading periodicals from the four corners of the world. But it was the Fifth Amendment articles in the June and July [1954] issues of the JOURNAL which were unequivocally the most dog-eared. This result of perpetual use surprisingly surpassed even that of the chic sections of the French photo-reviews. Foreign students appear to possess a deep interest in, and a sound knowledge of, our constitutional guarantees.

The overt presentation, in the same publication, of views supporting converse sides of such a controversial and explosive problem had to be enlightening. Especially when we bear in mind that many foreign periodicals are subsidized by some political party or faction. May copies of the JOURNAL continue to serve as dynamic, good-will ambassadors, not only of our Association, but of our country.

LEO E. LLOYD

Timonium, Maryland

The Bricker Amendment and the Webster-Ashburton Treaty

■ I have been interested in your setting forth in opposing articles controversial subjects, but so far as I can recollect, no author discussing the so-called Bricker Amendment has called attention to the fact that if that Amendment had been in effect in 1842, it would have been impossible to negotiate the so-called Webster-Ashburton Treaty. That treaty settled the boundaries of Maine and New Hampshire with Canada and was violently opposed by the states involved because it altered their boundaries without their consent.

If the Bricker Amendment is adopted, it is difficult to see how peace could be made with other countries involving areas claimed by any state and adversely claimed in part by another country.

Admitting either Hawaii or Alaska as a state might well give rise to such questions involving ownership of outlying islands, or of newly formed volcanic islands.

I hope you can arrange for the publishing of a suitable article from that point of view.

EDWARD THOMAS

New York, New York

The Lawyer and Capitalism

■ "The Lawyer and Capitalism" by William J. Palmer, Judge of the Superior Court of Los Angeles, which appeared in the November and December issues of the JOURNAL is, in my opinion, one of the finest discussions of its kind that I have ever read. Although I have never had the honor of meeting Judge Palmer, I desire to use this means of congratulating him and commending you for publishing his article.

Each issue of the JOURNAL, upon its arrival at my office, is taken home for reading when I have the time to enjoy it. On Sunday I never do any "bread and butter" reading, but use the day for cultural reading. Judge Palmer's article pleased and interested me very much.

I was also happy to read in the January issue of the JOURNAL that copies of this article have been reprinted by West Publishing Company as a public service. It is a *public*

service and thoroughly deserves the appreciation of the members of the American Bar Association. . . .

CYRIL W. McCLEAN
Oakland, California

Objects to Association's Stand

■ As a member of the American Bar Association I wish to record my disagreement with the action taken by the House of Delegates last August in opposing the enactment of H.R. 9922 (reintroduced this year as H.R. 1601) and authorizing the President of the Association to appoint a Special Committee to effect such opposition.

It seems to me that the bill is a reasonable solution to a vexing problem, presently a point of acrimonious controversy between two honorable professions, law and certified public accountancy. I am a member of both professions, having become a New York certified public accountant before I was admitted to the New York Bar.

One purpose of the bill is to establish control of federal tax practice by Congress, rather than state courts. This has been objected to on the ground of "states' rights". The difficulty with state control, however, is that practitioners would be subject to different rules in the various states as to how far a non-lawyer may go in tax practice. This chaotic situation would ultimately force all but lawyers from this field. The best qualified accountants would be the first to withdraw, not wishing to endanger their professional status with the threat of criminal prosecution for illegal practice of law.

The argument in favor of control by state courts rests on the proposition that because the tax is imposed by statute, advice or representation concerning a taxpayer's liability is the practice of law; and, therefore, should be controlled by state courts, in the same manner as such purely legal activities as drafting wills and deeds, or representing others in court proceedings. This technical approach ignores history. It will be hard to convince public opinion that certified public accountants, who have given satisfactory service in tax matters for upwards of forty years, never should have been allowed to engage in such activities in the first place.

Complete adherence to "states' rights" might create problems for lawyers as well as certified public accountants in federal tax practice. Logically, a member of the Bar of another state has no more right to practice law than an accountant. Such a limitation on tax practice by lawyers would create an intolerable situation for both the lawyers and the public.

The real purpose of the bill is to ensure the right of any qualified person to engage in tax practice, whether he is a lawyer or non-lawyer. The fear has been expressed that this objective would open the door to men without legal knowledge or training, who are not subject to any canon of ethics. It seems to me, however, that this is a matter of establishing proper safeguards which can be accomplished as well by the Treasury Department as by state courts.

Many income tax cases involve only factual matters or questions of accounting. Most are settled with the revenue agent who is not a lawyer. Taxpayers have been accustomed to retain certified public accountants in such cases. Many accountants have outstanding competence in this field and possess unimpeachable integrity. They have been engaged in tax practice for many years. There has been no showing that the public has suffered from their ability to practice. I do not believe it is in the public interest to exclude them merely because they are not lawyers.

I recommend that the Association withdraw its opposition to the bill on condition that proper safeguards will be adopted by the Treasury Department. These might include an examination on legal and accounting principles to establish the competence of candidates for federal tax practice, whether lawyers or non-lawyers. A similar rule, regulating practice in the Patent Office, has been in effect for many years.

To conclude, I sincerely believe that the decision to oppose H.R. 9922 was not in the best interests of our profession or the public. I hope that the action taken will be reconsidered.

VINCENT H. MALONEY
New York, New York

A Suggestion on the Fifth Amendment

■ I have been a member of the Philadelphia Bar for over fifty years and I have never been attorney for the defendant in a criminal case. But any point of law depending on the Constitution of the United States attracts my interest. And lawyers all over the country are talking about the evils of the Fifth Amendment, which provides as follows:

> No person . . . shall be compelled in any Criminal Case to be a witness against himself. . . .

My suggestion would be for Congress to pass an act providing that if a District Attorney, federal or state, calls the defendant to the stand and asks him a question, the court shall order the hearing of the case to be postponed until the new panel of jurymen reach the court.

It is an expensive matter to prepare for a criminal trial and any District Attorney would be very careful not to violate the act.

The Act should also provide that if a defendant desires to testify, the court should allow it, subject only to the usual cross-examination.

JOHN LEWIS EVANS
Philadelphia, Pennsylvania

Chief Justice Marshall:

The Expounder of the Constitution

by **Earl Warren** • ***The Chief Justice of the United States***

▪ In this issue in which we note the two hundredth anniversary of the birth of John Marshall, nothing could be more appropriate than an article from the man who now occupies Marshall's chair. And no one is better qualified to speak for the legal profession of the United States in appraising the work of John Marshall than the distinguished fourteenth Chief Justice, Earl Warren. The Chief Justice's remarks are taken from an address delivered last fall at ceremonies at the College of William and Mary, in Williamsburg, Virginia.

▪ It is our pleasure today to honor great men of another day, men who have contributed much to our national life and to the civilization of which it is a part. We speak of them, of course, in gratitude, but we have another reason, even more personal to present-day Americans and in keeping with the necessities of our time. We meet here to strengthen our own convictions concerning government and law; to fortify our belief in a government of laws and not of men. We seek rededication to the cause of justice, between individuals, between citizens and their sovereign, and between the nations of the world. We reach for perfect justice, but we do not expect to grasp it, because history both profane and divine teaches us that as long as time and human nature exist there will be issues to decide, causes to adjust. We learn from Holy Writ that even the angels quarrelled and that Satan and his angels were banished to darkness for their wrongs. We know that the path of justice in every time and place has been rough, tortuous and uphill. No nation has yet reached the summit. Exact justice has not been achieved. No mortal has embodied all its principles. We recognize, however, that civilizations of the past have advanced it; nations in all ages have made contributions to it and individuals have either evolved or formulated or synthesized principles of justice in a way that has challenged the admiration and emulation of people in many lands—people who are interested in that kind of government which is premised upon freedom and the dignity of the individual. We honor those nations for their accomplishments and revere the memories of such individuals for their contributions.

As Americans, we are proud of our system of government and our standards of justice, although we claim neither originality nor perfection for them. We, too, have had our great men who have made contributions to the sum total of human knowledge in the field of justice. We do not deify them. Like the sages of other countries, they were people, subject to all the limitations of human beings. As a nation, we make no pretense except to a passion for justice based upon the dignity and rights of the individual. We stake everything we have on our belief that only through this kind of justice can there be order and contentment within nations and peace between the countries of the world. We believe this kind of justice is the rightful heritage of every human being and that it is his right and duty to achieve it.

For three and a half centuries Americans, using the experience and wisdom of older countries from which we or our forebears came, have endeavored to develop in this section of the world a system of government and a body of law that will accord justice to everyone. We have made mistakes—many of them. People have at times succeeded in using our system for selfish and even oppressive ends. We have often been required to wipe some things from the slate and start again. At times we have been close to failure but we have never failed in our climb toward the pinnacle of true justice. And we are climbing today to meet the test of Thomas Jefferson that "The most sacred of the duties of a government is to do equal and impartial justice to all its citizens."

We do not assume that justice is indigenous only to our soil or in our own people. Waves of passion, prejudice and even hatreds have on occasions swept over us and almost en-

gulfed us, as they have the people of other lands. In our efforts to guard against these things, we have called upon the wisdom of the ages. We have accepted unblushingly the contribution of those intellects of other nations and ages who, in accordance with the circumstances under which they lived, have placed foundation stones in the temple of justice.

Our own symbol of justice, the home of the Supreme Court of the United States, honors great nations of law givers. It is of Grecian architecture of the Corinthian order so loved by the Romans and used by them in a countless number of their public buildings. In the courtroom itself, we give public recognition to the law givers of all ages. On the frieze of one wall are the figures of ancients who made their contribution before the birth of Christ: Menes, Hammurabi, Moses, Solomon, Lycurgus, Solon, Draco, Confucius and Octavian; and on the opposite wall the figures of those who came after Him: Justinian, Mohammed, Charlemagne, King John, St. Louis, Grotius, Blackstone, Marshall and Napoleon. The most significant to us, of course, are the figures of those who expounded the two systems that are the most alike of any because premised on the affinity of lineage, language, concept and emulation, the British and American. They stand side by side, William Blackstone and John Marshall. These men were contemporaries although not known personally to each other. The one had not been out of England; the other lived almost his entire life within a few miles of his beloved Virginia.

While Blackstone was writing his *Commentaries on the Laws of England,* Marshall was studying the great events of history upon which the rights of Englishmen were predicated in order to establish here a comparable system of justice. At that time, he and his compatriots were concerned not so much with a better system of justice than the English system as they were with having the same rights as Englishmen. A few years later he fought with Washington at Monmouth, Brandywine and Valley Forge to establish here a nation for that purpose. Blackstone expounded the law of England as it had developed by tradition, charter, statutes and judicial interpretation for a thousand years. Marshall expounded our Constitution, a document of 5,000 words, only a dozen years old, but which had been designed to establish for all times a more perfect Union of States that had but recently achieved their independence. That Constitution was an experiment in the science of government. Many people believed it to be a dangerous experiment. Many feared it and believed it would become another instrument of oppression. It was approved by the states only by the narrowest of margins. No one was certain if or how it would stand the test of time. One of the signers of the Constitution said, "Constitutions are not the same on paper as in real life." It fell to the lot of John Marshall to translate our Constitution from paper into real life, to enable it to meet the problems of a new, poor, war-tired and divided country. To say that it took wisdom, foresight, patience and courage to do this task is trite. But it is none the less true, and he did it for thirty-four years during the most formative and politically turbulent period of our national history, leaving at his death a greater imprint on our legal institutions than any American to this day has ever made. We honor him today at the beginning of the 200th year since his birth in testimony of the lasting and universal veneration in which his work is held.

It is appropriate that this recognition should be given him in his beloved Virginia where he lived all his life and in whose service he offered his life for the new nation he envisioned, in whose legislature he labored for the Constitutional Convention, where he worked for ratification of the Constitution, and which state he represented in the Congress. It is also fitting that this ceremony should be held at beautiful and historic College of William and Mary where he received his only formal education under the benign tutelage of George Wythe, then occupying the first chair of law in this country. John Marshall was not an orthodox student. Born in the wilderness, he learned from his parents and from an occasional tutor, but largely from the life of his time and from the great men of Virginia in the causes for which men struggled in those days. What men he encountered in his native state!—Washington, Jefferson, Madison, Patrick Henry, Mason, Monroe and a host of others immortal in United States history. Whether these men agreed in politics or not, they all had great minds, were passionately devoted to their own political philosophy and each sharpened the minds of the others either through friendly intercourse or political contention. Marshall was the beneficiary of these associations as much as any American of those days, whether it stemmed from the adoration he had for his beloved chief, George Washington, or from his almost lifelong political strife with his kinsman, Thomas Jefferson.

We are most fortunate that we can have with us on this occasion Dr. Goodhart, Master of University College, Oxford, where English law was first taught and where Sir William Blackstone taught and wrote his *Commentaries.* And how greatly we are honored by having with us on this occasion the Lord Chief Justice of England whose historic position makes him the guardian of the rights of all Englishmen as those rights have come down to them from Magna Charta, the Petition of Right, the Bill of Rights and the Acts of Parliament. It gives us a sense of comradeship in a very troubled world.

John Marshall has rightly been called the "expounder of the Constitution." It was new to the point of being without precedent when he became Chief Justice on January 6, 1801. The nation was poor as a result of years of warfare. Means of communication between the states were sadly lacking; there was no national economy; our standing among the nations of the world was deplor-

able; the states were divided in interests and politics; men held passionate views concerning the relationships between the three branches of government and between the federal and state governments. The leaders were men of powerful intellect and passionate convictions. There were those who would center most power in the Federal Government. There were those who would leave practically all power in the states. It was Marshall's mission in life to pursue a course somewhere between those two extreme positions through the construction of the new Constitution in a myriad of cases that arose during his thirty-four years as Chief Justice. He had spent a horrible winter at Valley Forge with Washington, and the weakness of the Government under the Articles of Confederation had seared his soul. He believed in a strong, central government—federal supremacy in all matters within the domain of the Federal Government. He believed the Constitution should be construed liberally to accomplish that end, and he confirmed the power of Congress to do so in these historic words:

> Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consist with the letter and spirit of the Constitution, are constitutional.

He believed that if we were to remain a nation we must have a national economy, and that any strong economy must be based upon the scrupulous performance of contracts, and the orderly regulation by the central government of commerce among the states and with other nations. He realized that if we were to command the respect of the world, we must meticulously fulfill our international obligations and honor the treaties we make. All of these desired results he achieved through decision after decision until they became embedded in our law.

But perhaps the greatest contribution he made to our system of jurisprudence was the establishment of an independent judiciary through the principle of judicial review. In a case instituted the first year of his incumbency, he rooted this fundamental principle in American constitutional law as our original contribution to the science of law.

This and many other of his decisions aroused a storm of protest as being beyond the words and intent of the Constitution, but for thirty-four years in accordance with his belief, stone by stone, he built the foundation of our constitutional structure, and he constructed it sufficiently strong to support everything we have since built upon it. In those thirty-four years of his incumbency, he wrote 519 of the 1,106 opinions handed down by his Court.

He did not go with the tide of public opinion or the course of politics. Often his opinions were contrary to both, but he continued to build, patiently, logically, courageously. His sense of duty is epitomized at the time of the trial of Aaron Burr, which he conducted fearlessly in spite of the intense feeling of the public and the national administration against the defendant. In the conduct of that case, as a Circuit Justice, he said:

> That this court dares not usurp power is most true. That this court dare not shrink from its duty is not less true. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without self reproach, would drain it to the bottom.

And he did his duty in that case, unpopular though it was.

He lived with this conviction throughout his long career. When his work was done and he passed away in Philadelphia on July 6, 1835, in the eightieth year of his life and the thirty-fifth of his Chief Justiceship, he was acclaimed by friend and foe alike as a man of virtue and great accomplishment.

His long-time friend and illustrious associate, Joseph Story, said of him:

> Chief Justice Marshall was the growth of a century. Providence grants such men to the human family only on great occasions to accomplish its own great end. Such men are found only when our need is the greatest. His proudest epitaph may be written in a line—"Here lies the expounder of the Constitution."

The people of Philadelphia accorded him a hero's farewell, and as his body was borne along the streets to the dock for transmittal to his beloved Virginia, the Liberty Bell tolled from the belfry of Independence Hall. Then a strange thing happened. A great cleft appeared in the side of the bell, and, like Marshall's voice, it too became still forever. It was taken down and placed in the Hall. It remains there today for all to see—the symbol of our liberty—while the memory of John Marshall abides with all of us as that of "The great Chief Justice", and "The Expounder of our Constitution".

President's Page

(Continued from page 675)

As you are all aware by now, Whitney R. Harris has resigned as Executive Director. During the emergency occasioned by his absence, the loyalty and unselfish devotion to duty of the "staff" has been beyond description. Olive Ricker came to our assistance upon a few hours notice. In the Foundation, John Cooper, as did Miss Beatrice Miers, also came back at great personal sacrifice. All have contributed to a smoothly running and efficient headquarters! You and I will long remain debtors to all the fine people at Headquarters!

I confidently turn the mantle of President over to the most capable hands of your new President, E. Smythe Gambrell, and I know he will receive and justly warrant your confidence and support.

Adios!

Legal Specialists:

Specialized Legal Service

by Henry S. Drinker · *of the Pennsylvania Bar (Philadelphia)*

■ **The problem of recognized legal specialties is no longer an academic one. This is an age of specialization, and many lawyers have urged the legal profession to follow the example of the medical fraternity and set up recognized categories of law specialists. The Association has a Special Committee that is studying the problem. Mr. Drinker has had many years' experience in considering questions of legal ethics and related problems, as Chairman of the Association's Committee on Professional Ethics and Grievances from 1944 to 1953. This article, however, does not purport to express or reflect the views of the present Committee.**

I.

■ In this age of specialization it is but natural that the legal profession should turn its attention to the training and qualification of legal specialists and should examine the recent experience of the medical profession in this connection.[1]

Law, however, is much less highly specialized than medicine. There are two kinds of medical specialists. There is first the doctor who treats his patients directly, but confines his practice to a special branch which the average doctor does not practice. Such are the dentists, oculists and the nose and throat specialists, analogous to whom are the patent lawyers and the proctors in admiralty. Verging on this class are the obstetrician, the gynecologist, the neurologist, the paediatrist and dermatologist, who confine their practice to a special branch which, however, is practiced to a certain extent by most physicians. Analogous to them are the lawyers who specialize in negligence cases and problems involving taxation.

There is also a large class of physicians who specialize in a distinct branch and whose practice is substantially confined to consultation with other doctors. Such are the specialists in diseases of the heart and of the brain, to whom there is no reasonably analogous class in the law.

Obviously it is dangerous to the public and also to the reputation of the medical profession to permit any doctor to hold himself out as a specialist in any branch of medicine unless his study, training and experience are such as to qualify him therein. Also, it is most helpful that there be available to every doctor a reliable means to find a competent colleague in any special branch of medicine in which he does not consider himself qualified to assume full responsibility. Accordingly, as long ago as 1917, the medical profession organized and made effective a system by which a doctor, by taking a prescribed course and by passing a test supervised by a committee of specialists may be qualified to hold himself out as an approved specialist therein, may display his certificate of qualification in his office and may be registered in a list of those so approved which is open to inspection by anyone looking for such a specialist, whether doctor or patient.

This arrangement was apparently to the advantage of the public, the profession, the registrants and those wishing to consult them.[2] In view of this, during recent years there has been a strong movement to organize through the American Bar Association a similar system to qualify legal specialists. In 1953 President Storey appointed a Committee on Continuing and Specialized Legal Education, charged with the duty of making recommendations concerning the policy of the Association relative to specialization in the legal profession. Its work was continued by the Committee on Specialization and Specialized Legal Education, appointed by President Jameson shortly after the 1953 Annual Meeting. In March, 1954, this committee made a comprehensive report to the House of Delegates, including a recommendation for the organization and incorporation of a permanent committee or board, with

1. See Charles W. Joiner, *Specialization in the Law? The Medical Profession Shows the Way*, 39 A.B.A.J. 539 (July, 1953).

2. Particularly in the beginning when it put a stop to the current practice of taking a six weeks' course abroad and returning to pose as a specialist in cancer and what not. There seems to be a good deal of question as to whether it has persisted with equal benefit.

an adequate staff and funds and charged with the duty of defining in what fields of legal practice specialization should be recognized and specialty groups approved, and of establishing standards of education, practice and proficiency necessary to qualify those admitted to membership in such groups. The recommendation was that qualification in any such group should permit the member to circulate, among lawyers only, a brief and dignified notice that he is a member of such specialty group, and to offer such specialized legal service to other members of the Bar, but not to advertise this to the public. It was not proposed, apparently, to qualify activities in which the ordinary lawyer is engaged, but only practices which involve a knowledge of a special substantive branch of the law.

The House of Delegates took no detailed action on this report but referred it to the Board of Governors for implementation. The Board accordingly appointed a Special Committee of three to implement the recommendations, whose report was printed in the advance program for the Annual Meeting of 1954. This report recommended that a council of nine be created with "exclusive authority to create, approve, and establish fields for specialized practice of the law and to create, approve, establish, supervise and regulate organizations of specialists within such fields". In view, however, of communications received by the Board of Governors between such printing and the meeting, the recommendations in the report were withheld and in October the Board held hearings at which a number of individuals and associations appeared to testify.

While the recommendations of these committees are of course important and well worth following up, they have unfortunately resulted in the indefinite postponement of an amendment to Canon 46 recommended by the Committee on Professional Ethics, and which, when properly understood, would in no way interfere with any program which may be adopted for specialization and specialized legal education. My primary purpose in writing the present article is to clear up the misunderstanding of the Ethics Committee's proposal which led to its rejection by the House of Delegates.

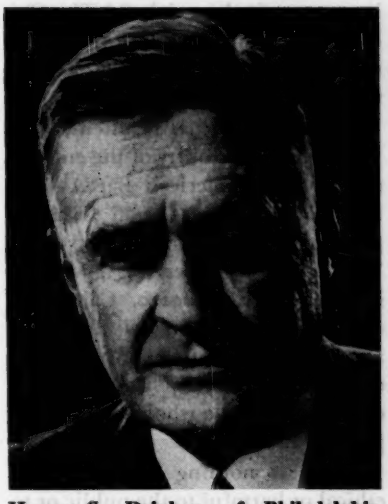
II.

Canon 27, since its adoption in 1908 as one of the thirty-two original Canons, has forbidden advertising and solicitation by lawyers except as expressly permitted. The two principal exceptions (other than cases "warranted by personal relations") are advertising by bar associations and law lists. In addition to these there is Canon 46, adopted in its present form in 1933 and providing as follows:

> 46. Notice of Specialized Legal Service.
>
> Where a lawyer is engaged in rendering a specialized legal service directly and only to other lawyers, a brief, dignified notice of that fact, couched in language indicating that it is addressed to lawyers, inserted in legal periodicals and like publications, when it will afford convenient and beneficial information to lawyers desiring to obtain such service, is not improper.

The "specialized legal service" contemplated by this Canon would include not only that in connection with a recognized specialty but also service in preparing memoranda of law, writing briefs and preparing cases for trial, which require no special legal education or training beyond that received by the average lawyer, and in which it would clearly not be feasible to qualify specialists.

However, the requirement in the present Canon 46 that the applicant must be one who renders the specified service "directly and only to other lawyers" effectively deters any lawyers from taking advantage of it, since, as a practical matter, there is no lawyer who either does not represent clients directly or hope to do so, and hence is unwilling to make the necessary representation to the contrary in the prescribed notice. As a matter of fact, during my thirteen years on the Ethics Committee, Canon 46 was regarded by us all as wholly ineffectual. Recognizing this



Henry S. Drinker, of Philadelphia, Chairman of the Association's Committee of Professional Ethics and Grievances for ten years ending in 1953, has been appointed by President Wright to complete the term of Wilber M. Brucker, who has served as Chairman of the Committee for the past two years. Mr. Brucker resigned as Chairman when he was appointed Secretary of the Army by President Eisenhower. Mr. Drinker is the author of the monumental Legal Ethics, published in 1953.

and also what the Canon was obviously intended to provide, the New York State Bar Association and also the New York City and County Associations issued a series of questionnaires, the answers to which are summarized in the June, 1947, issue of the *New York State Bar Association Bulletin* (Vol. 19, No. 3 at page 152). By such answers, as stated by Chairman Wherry "it will be seen that the Bar generally construes the Canons so as to make them practical and applicable to modern conditions."

Accordingly, all three New York Ethics Committees took it on themselves, by "judicial legislation" to ignore the provision as to serving only other lawyers and to treat Canon 46 as permitting all lawyers to make announcements to other lawyers, "both known and unknown", both by advertisement in a legal journal and by mailed notices, of their readiness to serve lawyers "in a particular branch of the law, whether or not it

be a recognized specialty".[3] The Chicago and California associations have made similar provision by amendments to their Canons.

This situation has resulted in the practical impossibility of the enforcement by the American Bar Association Committee of Canon 46 as applied to notices to other lawyers of "specialized legal services", whether in New York, Chicago, California, or elsewhere. It is entirely futile for any Ethics Committee to attempt the enforcement of any Canon which does not have the wholehearted support of the Bar.

There is nothing inherently unethical or harmful to the public or to the profession in a lawyer's making known to other lawyers, in a dignified announcement, his readiness to serve them in a designated field. No lawyer would ever employ another so to assist him merely because of an implied representation of competence inherent in such an announcement, or, for that matter, merely because he had been qualified as a specialist. He would in any event do so only after personal investigation from other lawyers who have seen what he can do. For seventeen years Canon 27 has contained a provision permitting any lawyer to state in a law list "branches of the profession practiced" which may or may not be branches recognized as "specialties". It is most useful for lawyers to know where they can obtain assistance from other lawyers, both non-expert and expert, and it is particularly fitting and desirable that young lawyers, eager to get started at the bar, should be helped to make their services readily available to those who need them.

Accordingly, the American Bar Association Ethics Committee asked the House of Delegates, at the 1953 meeting, to get in step with the Bar by amending the title and the text of Canon 46. The recommendation of the Ethics Committee was that it read substantially as follows:

> 46. Notice to Local Lawyers.
>
> A lawyer available to act as an associate of other lawyers in a particular branch of the law or legal service, may send to local lawyers only and publish in his local legal journal, a brief and dignified announcement of his availability to serve other lawyers in connection therewith. The announcement should be in a form which does not constitute a statement or representation of special experience or expertness.

The House refused to make such an amendment, on the representation by the Committee on Specialization that to amend Canon 46 would remove all restraint on the announcement of specialties and "open the gates for legal advertising". Obviously the proposed amendment would do no such thing, but would leave the Specialization Committee entirely free to make such further provision for specialization as, after thorough investigation, it deems desirable. In fact, the proposed amendment expressly disclaims the representation of any special qualification on the part of the applicant. Logically, any future amendment providing for specialization would be to Canon 45 entitled "Specialists".

The difficulty with the present situation is that it is certainly going to take considerable time for the Specialization Committee (if it be continued at the 1955 Annual Meeting) to come up with a satisfactory program of educating and qualifying lawyers as specialists accredited by the American Bar Association. No one is proposing to open the door to advertising for clients, or for lawyers, young or old, to extol their ability or proficiency, even to other lawyers. All they may ask under the amendment is that the lawyer employ them at will and give them the opportunity to show him what they can do.

Why should not the Ethics Committee's proposed amendment to Canon 46—which does not concern specialization—be adopted and effective while the research of the Specialization Committee is progressing?

3. See N. Y. City Committee Decision No. 963; N. Y. County No. 375.

■ Whitney R. Harris, who resigned effective July 1 as Executive Director of the American Bar Association, has accepted appointment as solicitor for Texas for the Southwestern Bell Telephone Co. This was announced in Dallas on July 7 by Ed Gossett, general attorney for the company's Texas area.

It was announced that Mr. Harris will assist Mr. Gossett in directing the company's legal affairs in the State of Texas. The appointment is effective September 1. Mr. Harris and his wife will make their home in Dallas.

Mr. Harris was a member of the administrative law faculty at Southern Methodist University in Dallas from 1948 to 1954. He also was chairman of the Texas Administrative Law Committee and participated in drafting the proposed Texas Administrative Procedures Act. More recently, he served as staff director for the legal services and procedure task force of the Hoover Commission.

• • •

Personal Injury Law:

Law Schools Need To Give a Shot of Medicine

by **Ben F. Small** • ***Professor of Law at Indiana University***

▪ **Seven out of ten personal injury cases, Professor Small writes, turn on medical considerations rather than legal. And yet the great majority of our law schools furnish no preparation at all for the fledgling lawyer in legal medicine. Strangely enough, the medical schools seem to be more aware of the interrelationship of law and medicine. Professor Small writes of what one law school is doing about this situation.**

I. *A Dilemma*

▪ Law schools may need many things, but most of all now, they need a quick shot in the proper musculatures of the curriculum—a shot of medicine.

The American species of man has finally cultured himself into a wonderfully mechanical being, but, like a good many oil or gas converted furnaces of ancient origin, the converted product often fails its demands and things go wrong. So, every year, about nine million of these converted human units fall victim to some serious and disabling injury.[1] Being the litigious creatures they are, they tend to sue. The result —an obvious one—is a tremendous increase in the volume of personal injury litigation. In that litigation, in tort, in wrongful death and in workmen's compensation, it seems fair to estimate that seven out of every ten contests turn, not upon doctrines of law, but upon medical evidence as to what the particular harm is and what caused it to come about.[2]

What have the law schools done about preparing their product for all this? As to the law, they have done a pretty good job. All the old jargons of tort continue to be labored and the rules of evidence and of procedure and appeals are stressed in exquisite refinement. They always have been; it is traditional. And yet, the law schools overlook, almost to unanimity, the one homely fact—*seven out of every ten litigated personal injury cases turn on medical considerations rather than legal.* And medical evidence is the one field about which the young law graduate knows nothing, and his professors know about as much.

II. *Practicing Lawyers Are Fighting Their Way Out*

The young practitioner soon appreciates his shortcomings. Being outmaneuvered on his medical feet in his first personal injury case (as was this author in a complicated case of claimed traumatic aggravation of a pre-existing spina bifida condition) usually affords sufficient notice. If not, a few more such brushes will. As the volume of personal injury litigation has increased over the past several years, the need for medico-legal know-how has been pressed home to most practicing lawyers. They have bought more medical books than ever before, and the newer law books on trial practice have been including more medical lore than ever before.[3] At the same time, legal institutes have been veering away from the once-popular subjects of taxation, corporate structures, procedure and the like, toward legal medicine. In just the past five years, the medico-legal variety of institute has grown to the point of outdrawing, in attendance, any other kind of practitioner training course. Ranging from relatively long established post-graduate training organizations like the Practising Law Institute in New York,[4] down to local city and county bar groups, these

1. Statistics of the National Safety Council, reported in 10 NACCA L.J. 18, note 3 (1952). Industrial injuries alone are said to occur at the rate one every sixteen seconds. See Richter and Forer, *Federal Employers' Liability Act—a Real Compensatory Law for Railroad Workers*, 36 CORNELL L. Q. 203 (1951).

2. This is the estimate used by Dr. Hubert Winston Smith in several of his Law-Science Institute programs. He reports that even as early as the turn of the century, in 1909, one Massachusetts county court's experience showed 60 per cent of the cases involving expert testimony. See Smith, *Scientific Proof and Legal-Medical Relations*, 10 UNIV. OF CHI. L. REV. 243, 245 (1943).

3. See for example, Belli, MODERN TRIALS (1954); Goldstein and Shabat, MEDICAL TRIAL TECHNIQUE (1942).

4. See the Institute's *Transcript of Saturday Forum on Medical Proof in Back Injuries, Conducted March 7, 1953* (1954).

institutes have had an unprecedented appeal among lawyers. They have become so popular that institute sponsors often get in each other's way on the calendar. During one week, or more precisely, during one half week, in December of 1953, four big national and area institutes were in operation at the same time, competing both as to time, and as to lecturers.[5]

There is no accurate way to determine the number of lawyers benefited by these institutes or the degree of that benefit. Some last only part of a day, others a day, others two days, or even three. Others may run a week or longer. Dr. Hubert Winston Smith, that accomplished phenomenon of expert lawyer and expert doctor combined,[6] has to date taken his University of Texas law-science program to more than 2,000 practicing lawyers through eighteen institutes held in various metropolitan centers across the country.[7] The National Association of Claimants' Compensation Attorneys (NACCA), now in its ninth year, has also served, through its national, state and county meetings and its seven-year old *Journal* to bring medicine to countless numbers of lawyers, who, surprisingly enough, are not all claimants' men.

The practicing lawyers then, are fighting themselves clear of their handicap and making striking gains too. But what of the law schools, the law schools that helped bring on the handicap in the first place?

III. The Law Schools' Obligation

It must be conceded that a few law schools have been quite mindful of their obligation. Tulane University was perhaps the first to act on it. The University of Texas now probably leads all the others in the degree and excellence of its attention to the need. Yet, most of the country's law schools are content to do no more than join now and then with some other initiating organization in the sponsorship of an institute for practicing lawyers. They may furnish the physical facilities for such a meeting, may supply an occasional guest lecturer from the faculty and may occasionally turn over an issue of their law review for a medico-legal symposium. However, few indeed are the schools that have done anything to prepare their own students for matters medico-legal. This neglect is a curious one, particularly in view of the fact that from the other end, the better medical schools have for years felt it necessary to give their students instruction in certain areas of the law. Why then, have the law schools not widened their instruction to include a shot of medicine?

The reasons given are usually three: (1) no sufficient need; (2) it would require expansion of an already bursting curriculum; and (3) it would cost too much money. None of the reasons is valid.

First, as to need, the bare fact that more than half the litigation turns on medical rather than legal pivots should be proof enough. If more is needed, let it be gathered from the thousands of practicing lawyers who have found it necessary to sacrifice time and money in self-obtained training after they have graduated from law school.

The second and third excuses require more examination. True, a full-scale program of formalized medico-legal instruction would impose serious burdens on both the curriculum and the budget. Law school curricula are already stretched beyond their seams. Through the years, new courses have been wedged in with the old until the traditional framework of the three-year course of study has been distended to the breaking point. Others might be desirable, but as one dean laments, it would take a ten-year curriculum to accommodate all demands.[8] Adding a comprehensive medico-legal program would only compound the difficulties. It would be expensive too.

How It Can Be Met

Many believe that the additional curricular and budgetary burdens, heavy though they may be, are essential to a complete legal education, that the need for a complete medico-legal program of instruction is great enough to warrant whatever dislocations might have to be made. More realistically, however, if that cannot be the case, there are a number of next bests, which, despite shortcomings, can afford law students some acquaintance with the basic medical problems. Next best is used advisedly; certainly there is no next-best to a thorough understanding of the pathology of injury and disease. However, there are certain basic starting points.

The prospective lawyer should certainly have a smattering of information on cell, tissue and organ function. He should know something of the body's nine systems and their general workings. He can then understand, for example, how it may be possible that John Doe's untimely death from pulmonary embolism really originated with the broken ankle he suffered some time earlier. He can deal understandingly with a multi-link causal chain like that unraveled in *Magna Copper Co.* v. *Naglick*:[9] (1) X, suffering from pre-existing spinal tuberculosis, was working with a pneumatic drill; (2) the drill broke; (3) X fell and sustained bruises; (4) these injuries agitated his existing spinal condition; (5) the agitation necessitated his having a spinal fusion operation; (6) the operation caused him to be

5. On December 10 and 11, the Texas Law-Science Institute, in co-operation with the State Bar of Michigan, put on the elaborate Detroit Medicolegal Institute. On December 9, 10 and 11, the Southwestern Legal Foundation, in co-operation with Southern Methodist University, staged its Institute on Personal Injury Litigation in the new Legal Center in Dallas. On the twelfth, Rutgers University, in co-operation with the New York University Post-Graduate Medical School, the New Jersey State Department of Labor, the New Jersey State Bar Association, the Medical Society of New Jersey and nine other legal, medical and labor groups, held its attractive Medical-Legal Institute at the Academy of Medicine of Northern New Jersey in Newark. On the eleventh and twelfth, the Mississippi Law Institute and the University of Mississippi joined to put on a similar program in Jackson.

6. With both law and medical degrees from Harvard and practice experience in both fields.

7. A sample program might be that of the Houston Short Course in February, 1953. The program alone runs to sixty pages and embraces seventy-six hours of instruction, 113 lectures, forty-five panels and 225 presentations.

8. See Prosser, *The Ten-Year Curriculum*, 6 JOUR. LEGAL ED. 149 (1953).

9. 60 Ariz. 43, 131 P. 2d 357 (1942).

confined in a post-operative cast; (7) the cast impaired his respiration; (8) impaired respiration brought on a pulmonary infection; (9) the infection caused a phlebitis in the pulmonary vein; (10) a thrombus developed there; (11) it broke from its moorings and was carried to the heart as an embolus; (12) coronary embolism; and (13) death.

The prospective lawyer should have some specific acquaintance with trouble zones of the body—the lumbar spine for example. He needn't be able to click off the half a hundred or so possible causes for low back pain, but he should know something of the ruptured intervertebral disk syndrome, still relatively new to medical men. He should know a little about the degenerative changes to which the disk is subject, how the nucleus pulposus, or contents of the disk sac may extrude through its retaining structures into the spinal canal to compress and squeeze nerve roots there. Then he will not so readily dismiss such a possible catastrophe as just another case of lumbago, the diagnosis of older doctors and popular magazine writers.[10] He should know enough of the symptoms to recognize for himself the disk possibility, and he should be aware of the advantages and the risks incident to myelographic diagnosis.[11] Finally, he should know something of the still-debated methods of herniated disk treatment.

Beyond the general smatterings as to body function and disfunction and the familiarity with injury trouble areas, the lawyer should be apprised of a few of the newer specialized diagnostic procedures. He should know, for example, something that many older medical practitioners do not yet know—that quite a variety of brain disturbances may be subject to some fair degree of definition and measurement through use of the big new eight-channel electroencephalograph, or EEG, as the brain wave recorder may be called by the M.D.'s. He should know where such a machine and a competent reader can be found.

The prospective lawyer ought to acquire an insight into the thinking habits of the medical men and understand how the medical expert witness, in evaluating reasons for a plaintiff's present condition, may tend to assign prime causative role to whatever natural pathological forces may be present.[12] In the case of a ruptured artery, for example, the young lawyer should know that medical witnesses may find their cause in the pre-existing pathology of an already weakened, ready-to-rupture lesion in the arterial wall, assigning no great significance to the actual "triggering" effect of a blow or a strain or exertion incident to lifting, pushing or so "normal" a reaction as vomiting in post-traumatic shock. If it should be an alleged traumatic arthritis, the prospective lawyer should know that the almost normal pre-injury "spurring" and "lipping" arthritic processes so common to aging people may look more significant causally to the doctor than the "normal" aggravation following injury.

The lawyer should know too, that the doctor's penchant for "normal" pathological sequences carries him to the same "normal" end in many cases of death after surgery or penetrating injuries. Post-operative shock, pneumonia, embolism—any one of them may be perfectly "normal" to the doctor in a particular case, just the natural steps which nature rather than man induces. Such fundamental informations and understandings are essential to either side of a personal injury case.

Difficult though it may sound, all this and much more can be imparted to prospective lawyers with the minimal resources available to any law school. The University's medical school should be happy to supply lecturers. The author's own experience with the administration and faculty of the Indiana University Medical Center has been most gratifying. Not only have they been *willing* to help; they have been *enthusiastic*. Many of these men hold a storehouse of practical experience as expert witnesses in the hard-boiled business of courtroom medicine and they know its demands. Perhaps for that reason, they, much more than law school personnel, appreciate the need for some integration of the two sciences. If there is no medical school to look to, then the hospitals, the medical associations and the doctors of the immediate community should be willing to help. Such a program costs the law school nothing. And it need not overtax the curriculum planners. No formal course insertion is necessary. The medical lectures and demonstrations, carefully planned in ascending order, can be fitted as an accessory to the existing courses in evidence or torts, with perhaps one session a week or one every two weeks given over to the

Ben F. Small has been Professor of Law at the Indianapolis Division of Indiana University since 1945. He received his A.B. from Indiana State Teachers College in 1941 and his J.D. (with distinction) from Indiana University in 1943. He turned to teaching after practicing in Terre Haute, Indiana. He is the author of Workmen's Compensation Law of Indiana (Bobbs-Merrill, 1950) and a lecturer on numerous medico-legal institute programs.

10. See for example, an article in the January, 1955, READER'S DIGEST, which contains, at page 107, the misleading statement, "A favorite malingering malady is the ruptured spinal disc, an ailment once called lumbago."

11. That procedure in which an opaque oil or other substance is injected into the spinal canal and its course followed by X-ray or fluoroscope.

12. See Small, *Gaffing at a Thing Called Cause: Medico-Legal Conflicts in the Concept of Causation*, 31 TEX. L. REV. 630 (1953).

special purpose. Or, if time will not permit in those courses, the medical sessions can be scheduled in the evenings or on Saturdays, times when the medical lecturers are probably more available anyway.

IV. A Sample in Operation

For two years now, the author and his students at the Indianapolis Division of Indiana University School of Law have been experimenting with a sample of the program outlined above. The particular course vehicle is a two semester hour course in workmen's compensation. It could just as well be torts or evidence, but in this case it is workmen's compensation.

The course begins in normal fashion, with full emphasis on the law of employment-occasioned harms. Then, after about the fifth week, when the students have begun to get a feel for the law itself, the ancillary medical instruction begins. For all this, we can call on the university's medical school for (1) lectures and demonstrations and (2) autopsy observation.

Medical Lectures and Demonstrations

Once each week for the remainder of the semester medical lecturers meet with the class, usually during one of the regular periods. Those lectures, barring an occasional upset, are designed to build from the simple to the more complex. The first lecture covers the ingredients of a thorough physical examination, with a demonstration of techniques used for discovery and evaluation of abnormality. Then a session on X-ray techniques follows and, after that, one on the values and uses of autopsy in determining effect of injury and cause of death. One session is given to the effects of trauma in causing or aggravating pre-existing conditions. We have a long session on brain and spinal cord injuries, along with a demonstration of the electroencephalograph. We have another on the pneumoconioses—dust, gas and smoke inhalation and their effects. And we finish with a session on disability evaluation.

In each instance within our two-year experience the Medical Center has supplied its best, ranging from the Dean himself, through the Chief Radiologist, the Chairman of the Neurology Department, the Director of the Hematology Lab, the Director of the State Board of Health's Industrial Hygiene Division, and others of the top staff at the Center. All but two of the sessions were held at the law school; those two, requiring demonstration of (1) the electroencephalograph and (2) X-ray equipment were held at the Center, for obvious reasons.

Observation of Autopsies

This year we expanded a bit over last year's program. We went on autopsy call—at least most of us did. The two or three who preferred not to were of course excused without prejudice. Witnessing a complete post-mortem examination of a still warm, limp body is anything but a pleasant affair and certainly no one should be expected to attend one unless he is quite sure he wants to. It is especially difficult for the law school faculty man responsible. It is he who is "on call" and must relay the call to the members of the class when he gets it. Since the autopsies nearly all involve hospital deaths, not subject to any schedule, these calls sometimes come at quite inappropriate times. But worse, because of the lack of advance notice, not all members of the class may be available and free to go at any one time. As a result, it takes several autopsies to cover the entire class, and the faculty man, not wishing to appear disinterested so far as any of the individual witnessing groups is concerned, feels called upon to attend each. This year, for example, the author was put to the gory total of five autopsies in this manner and is even now having some difficulty regaining his taste for such things as rare steaks and roast beef.

All in all, however, the autopsy observations did do a great deal to round out the program. They provided a much better understanding of the *why's* and *how's* of body reaction to stress. Hemorrhage, for example, always a threatening factor in any case of body insult, cannot be appreciated fully as internal pathology until it is actually observed in its internal context. Everyone of course knows something of the nature of cerebral hemorrhage, but how much more graphic it becomes when a head is actually opened and the brain is removed to reveal the reasons for the ante-mortem symptoms recorded on the deceased's hospital chart. A ruptured aneurysm too, becomes real for the first time only when seen. That variety of hemorrhage, like all others, constitutes a fairly common industrial employment risk, particularly where older people are employed. Studying workmen's compensation cases, as we had, on ruptured aneurysm had brought little real understanding of what strain and exertion or injury may mean to a weakened artery. However, when one looks up and down the length of an opened-up aortic artery, one heavily corroded with the gummy yellow plaque formations so common to arteriosclerosis, he can readily understand why the victim suffered an increase in blood pressure resulting from loss of elasticity. He can appreciate too, how that increased pressure sought an outlet at the weakest, thinnest point of the artery, causing the bulging aneurysm there which ultimately had to blow out, much in the manner of an over-inflated old tire with a swell on its side.

Equally pertinent was the information gained on the formation and behavior of blood clots. The clotting process, entirely normal, may of course accompany any disablement, whether from penetrating injury, contusion or simply the infirmities of old age. Simply being bedfast without activity slows the circulation and increases the blood's coagulability. These factors, plus any roughening or constriction which an injury may have caused to the normally smooth, slick lumen, or lining of a vessel, are very conducive to thrombosis, or clotting. But more important are the effects which it may

have. Any clot may break from its moorings to become a free floating embolus, to lodge in the heart (coronary embolism), or, escaping the heart, wind up in a lung (pulmonary embolism). The autopsies, particularly one involving death after heart surgery, were helpful in understanding these risks.

Throughout all the autopsies, the resident physicians performing them were most co-operative with our purpose, taking care to explain their work step by step as they proceeded. Not only did they discuss the immediate findings before them—a kidney infection and stone in one case, a cancer spread in another, trauma to the heart in another, a "wet" lung in another, hemorrhage and clot sites in another—but they also took time to relate other anatomical functions not immediately involved in the case before them. The inguinal rings, so illusory to most lawyers dealing with hernia, were pointed out and examined, as were the valves of the heart, so often involved in cases combining a history of syphilis or rheumatic fever with accident or employment stresses. The heavy but harmless deposits of coal dust in a pair of lungs were discussed, with an explanation of the difference which lungs bearing the same amounts of silica dust might show.

V. Conclusion

All this took time, a great deal of time, on everyone's part. For the medical lecturers who came to the law school with their out-patient examining kits, their X-ray pictures and light boxes, their charts and their tissue plate exhibits, it meant considerable work in addition to time sacrifice. But not one was reluctant or even indifferent in his mission. And the resident physicians and interns of the autopsy room were, as stated, more than willing to help, though it meant prolonging their hours at the table.

As for the law students, they bore some time burdens too. In addition to the medical side of the program, they had to keep up with the law side as well, which proceeded the same as any other law class. Indeed, a few extra sessions had to be arranged. It meant that some were late in getting home to their families at night. Others had to forgo a football game or two. A few missed a meal occasionally—by coincidence, usually after an autopsy. But with it all, they seemed to grow considerably during the semester; and they enjoyed it. Even the extra sessions, noncompulsory, with no attendance record taken, were welcomed by all with a feeling that here was something of practical, worth-while value which they wanted to capitalize on while they had the chance.

There may be other, better ways to integrate the pertinent fringes of law and medicine.[13] The little program outlined above is only one person's attempt. It cost no money and it burst no curriculum. But whatever may be said of methods, the time has come when the patient needs a shot. The medicine should be made available.

13. Certainly some integration should be made between criminal law and medicine, particularly behavioral science. And, beyond the study of mere technical matter, the ethical considerations of law and medicine might stand some examination. The University of Pittsburgh, for about a year and a half, has been so engaged, experimenting with an interprofessional seminar in which not only the law school and the medical school co-operate, but also the Department of Philosophy.

ASSOCIATION CALENDAR

REGIONAL MEETINGS

St. Paul-Minneapolis, Minnesota	October 12-15, 1955
New Orleans, Louisiana	November 27-30, 1955
Hartford, Connecticut	April 15-18, 1956

States Included

ST. PAUL-MINNEAPOLIS (Northwestern Regional Meeting)—Iowa, Minnesota, Montana, Nebraska, North Dakota, South Dakota and Wisconsin (W. W. Gibson, Honorary Chairman, Roanoke Building, Minneapolis 2; Ivan Bowen, Co-Chairman, Rand Tower, Minneapolis 2; John B. Burke, Co-Chairman, Minnesota Federal Building, St. Paul 1) *(Headquarters, St. Paul)*

NEW ORLEANS (Deep South Regional Meeting)—Alabama, Arkansas Florida, Georgia, Louisiana, Mississippi, Oklahoma, Tennessee and Texas (Cuthbert S. Baldwin, General Chairman, Richards Building, New Orleans, 12; P. A. Bienvenu, Chairman of Registration and Hotel Accommodations, American Bank Building, New Orleans 12)

HARTFORD (Northeastern Regional Meeting)—Connecticut, Maine, Massachusets, New Hampshire, New York, Rhode Island and Vermont (Cyril Coleman, General Chairman, 750 Main Street, Hartford 3)

(For information and reservations, write to the chairmen listed above)

John Marshall:

The Fourth Chief Justice

by Douglas H. Gordon • *of the Maryland Bar (Baltimore)*

■ **This year marks the bicentennial of the birth of John Marshall, Chief Justice of the United States from 1801 to 1835. Appropriate ceremonies of commemoration of the birth of the great Chief Justice will be held during the Association's Annual Meeting in Philadelphia this month with the President of the United States delivering the principal address. Mr. Gordon's review of the life of Marshall is based on Beveridge's biography. It skillfully throws into sharp relief some of the high points of the career of the great Chief Justice and emphasizes his high character and legal acumen. Mr. Gordon has made a very careful study as a foundation for this article.**

■ Nearly every lawyer's library contains the handsome, but externally somewhat forbidding, four-volume *Life of John Marshall* by Albert J. Beveridge. Unlike the eleven volumes of Campbell's *Lives of the Lord Chancellors* and *Lives of the Chief Justices,* the *Life of Marshall* is not abounding in witticisms but it has other attractions. In addition to being extremely accurate and well written, it dramatizes the life of its hero and the period in which he lived so as to constitute an unparalleled picture of the early days of the Republic—extremely vivid for being composed brief-like of excerpts from speeches, books, letters and other documents of the day.

The career of the author of the great classic on Marshall is nearly as interesting as the life of his hero. Albert Jeremiah Beveridge was born on October 6, 1862, on a farm in Highland County, Ohio. His father, Thomas Henry Beveridge, was a Virginian of Scotch descent. His mother was of Scotch-Irish and English background. The father, a self-reliant and hard-working farmer, unfortunately led a life of financial difficulties. The son from the age of 12 was doing a man's work, and at 15, was already in charge of a logging camp when his father had a contract to furnish lumber to a railroad. But he was able to attend public school and there became active in the school debating society. In the fall of 1881, armed with $50, he entered De Pauw University. He had to work for his living and was burdened in his first year with having to overcome a shortage of Latin. But he received the highest grades in all his studies, became an active member of the Platonian Society (colloquially known as Old Plato) and a leading college debater. The prizes he won in debating assisted greatly in paying for his education, and established his early prestige.

After graduation Beveridge spent a year in the western part of Kansas, supporting himself as a real estate promoter and regaining his health which had been injured by overwork. He arrived in Indiana in 1886 and began his legal studies in the office of former Senator Joseph E. McDonald, having been rebuffed when he attempted to form an association with Benjamin Harrison, shortly afterwards President.

Indianapolis in those days had a group of citizens of national stature. Benjamin Harrison and Senator McDonald; three Vice Presidents, Thomas A. Hendricks, Thomas R. Marshall and Charles W. Fairbanks; Cleveland's Secretary of State, Walter Q. Gresham; Albert G. Porter, United States Minister to Italy; Addison C. Harris, Minister to Austria; Lew Wallace; Meredith Nicholson; Booth Tarkington and James Whitcomb Riley. There were in addition many secondary characters who helped make it a cultivated and delightful city. Beveridge became friendly with all of these as he rose rapidly in his profession. With the growth of his reputation as a lawyer and an orator, he spoke at increasingly important occasions. In giving a Lincoln Day speech at the Republican Club in New York, he met Chauncey Depew and his future idol, Theodore Roosevelt.

In 1898, Beveridge was elected to the Senate. Before he took his seat, he visited the Philippines. His first speech on the subject of the Philippines was on the "Manifest Destiny" theme. He urged that the American flag should remain forever in the Philippines, and that the Constitution did not follow the flag so as to require democratic government among the Filipinos. The enthusi-

astic reception of his speech was followed by a studied slight, when, as he began a speech some days afterwards, the entire body of the Senate left the room. This rebuke to his loquaciousness as a freshman Senator was symbolic of the disappointments his public life was destined to hold for him.

Beveridge's greatest accomplishment in the Senate was securing the passage of the Meat Inspection Bill, which led to the Food and Drug Act. He introduced the bill creating a tariff commission, based upon his studies of such a commission in Germany (but which did not pass until years later). His brilliant speeches in favor of lower tariffs were among the most sound economically ever put forward in the Senate. But Roosevelt proved to have no grasp of economics and did not render any help. The lowering of tariffs was actively advocated by the National Association of Manufacturers, and was agreed to in Taft's platform. But Taft was glad to allow a "compromise" which lowered a few items but raised tariffs on many more.

When Beveridge's efforts were unsuccessful and when Taft refused to veto the tariff act which violated his platform, Beveridge was marked for political destruction and was defeated in the election of 1910. His great friendship with Theodore Roosevelt caused him to join the Progressive Party, which also went down to defeat in 1912. The Party finally disappeared when Roosevelt's characteristic selfishness made it evident that he was prepared to return to the Republican Party if he could be nominated for the Presidency.

Beveridge's actual accomplishments in the Senate were relatively small. The study that preceded his speeches made them important, if not often successful. His courage in fighting child labor, in which Roosevelt also refused to help, must be admired. His denunciation of corrupt business while strongly supporting good business set the basis for a sound policy too little followed in future years. The results he obtained in a period of party loyalty, rather than of devotion to ideals, were not in proportion to his diligence, ability and great character.

The Life of Marshall . . . *Beveridge Begins His Book*

During the years after Beveridge's departure from the Senate, he worked on a life of Marshall. This he had contemplated from his early days at the Bar. At that time, the best life of Marshall was in the "American Statesmen" series. The editor of this series, John T. Morse, Jr., in his preface, prophetically stated that "in the rightness of time, there will surely arise some student more ambitious of doing a useful work than of writing a book which shall attract many readers, and he will devote his laborious days to discussing the topic of the influence of the Supreme Court on the history of the United States". The prophecy was destined to be carried out in Beveridge's *Life of Marshall,* not only a "useful work", but one which had the power "to attract many readers"—many more than the correct but colorless earlier work.

Beveridge had, while he was Senator and much more afterwards, written many articles on public matters. The thoroughness he had shown as a lawyer, was equalled by the scholarly work which went into all of these, and the impassioned manner of his orations developed in his articles into an energetic, concise and readable style. In addition to articles and to his speeches in public life, his belief in a strong national government of which Marshall had been the outstanding early advocate, qualified him for the task of being the great Chief Justice's biographer. When the first two volumes appeared in the spring of 1917, they were acclaimed as a real contribution to history and to literature. Two years later, the third and fourth volumes concluded a biography which was declared to be one of the most important in the English language.

It begins with the birth of Marshall, in a farmhouse in Fauquier County, Virginia, shortly before Braddock's Defeat in 1755. His mother was Mary Randolph, a descendant of Colonel William Randolph, of Turkey Island. From them were descended also Thomas Jefferson, physically like his cousin, John Marshall, but of a wholly different temperament, Light Horse Harry Lee, Edmund Randolph, John Randolph, Robert E. Lee, and a host of lesser figures. His father was Thomas Marshall, like Jefferson's father, not a man of outstanding family.

The care with which Beveridge goes into the genealogical origins of his subject is equalled by his portrayal of the military, social, economic, educational and political background of eighteenth-century Virginia. The two opening chapters of the book by contrast to most biographies are full of interest. The next two chapters show Marshall's part in the Revolutionary War, and how the chaos of conflicting Colonies' attempts at independent rule prepared him for his subsequent role in strengthening the authority of the newly formed Federal Government.

Marshall had been destined for the Bar since his childhood. His father is known to have owned a copy of Blackstone, possibly acquired for the son's benefit. His formal education in the law, under George Wythe, lasted only six weeks in the spring of 1786. On the strength of this he was elected to the Phi Beta Kappa society, was licensed by Jefferson, then Governor, to practice law, and admitted to the Bar in Fauquier County. In 1782 he was elected to the legislature. He was married a year later, his legislative salary being virtually his sole income. From 1784 to 1787 he was not in the legislature, but was re-elected in the fall of 1787. There he rendered the great service of introducing a resolution, acceptable to all factions, calling the Virginia Convention for passing on the national Constitution.

As a preparation for his account of the Virginia Convention, Beveridge gives three magnificent chapters on the isolation of Virginia communities, the antagonism to government in general and the struggle for ratification of the Constitution in

Douglas H. Gordon is a graduate of Harvard College and the Harvard Law School. He has practiced in Baltimore since 1929, except for three years spent as President of St. John's College in Annapolis (1931-1934) following a year as Secretary of the College. He was a member of the Maryland House of Delegates from 1930 to 1934 and an Assistant United States Attorney from 1934 to 1939. He is the author of occasional reviews and articles on history and is active in civic affairs.

---

other states. In the chapters on the Convention, its controversies, the gains and losses of the constitutionalists and the anti-constitutionalists, and the tactics successful and erroneous are arrayed in a truly thrilling manner.

The Virginia Convention . . . *The Constitution at Issue*

The Convention in Virginia, in view of the importance of that state not only in size, but in its military and constitutional leadership of the Revolution, would obviously determine the fate of the Constitution as the fundamental law of a united and strong nation. The opponents of ratification were headed by George Mason, author of the Virginia Bill of Rights, Richard Henry Lee and Patrick Henry. The leaders of those who favored the ratification of the Constitution were George Wythe, Edmund Pendleton, President of the Convention, Edmund Randolph, Light Horse Harry Lee, and, as it turned out, of first importance, John Marshall.

George Mason first carried a proposal that the Constitution should be discussed clause by clause. Thus at the outset, the chance of an immediate hostile vote was lost. A second danger was averted when Chancellor Pendleton ruled to be out of order any discussion of whether the Constitutional Convention in Philadelphia had exceeded its powers. Patrick Henry's onslaught upon the Constitution was overcome by Governor Randolph's defense. Then George Mason made another tactical mistake characteristic of his disinterestedness and true patriotism. He offered "to make the greatest concessions . . . to obtain . . . conciliation and unanimity". Thus the edge was taken off the hostility of many delegates.

Speeches by Chancellor Pendleton, Madison, Light Horse Harry Lee and by such lesser figures as George Nicholas and Francis Corbin helped the cause, but did not carry the day.

Marshall then spoke for the adoption of the Constitution. He stressed the powerlessness of the separate colonies during the war, the importance of a strong union as opposed to the weakness of merely co-operating states. He also spoke effectively in the debate on the judiciary which was the true climax of the fight. The struggle between the debtor and creditor classes, always so important in governmental upheavals, entered into the question of the Constitution at the point where the judiciary was concerned. It was in the debates on the judiciary that the danger of federal laws outside the powers granted by Congress was being held up as a means of opposing the adoption of the Constitution. Marshall anticipated his later and most famous decision by asserting that the federal judges would declare such laws to be void. He also explained away a fear that cases being tried in federal courts would not have the benefit of the application of the law which truly governed them. He pointed out that the place of the making of the contract would govern its enforcement wherever the contract was sued on. The fear of the loss of jury trials he pointed out was groundless, being so fundamental as not even to have required mention in the Virginia Constitution, which merely recommended them. Congress, like the legislature of Virginia, would provide them in all expedient cases.

At this point in the Convention, the legislature of Virginia, thought to be hostile to ratification, was about to meet. The opinions of the delegates had been formed by discussions on the highest possible level. It was felt that the Constitution would have to be put to a vote. To conciliate a few uncertain delegates, and to feel out the strength of the opposition, George Wythe urged that all necessary amendments of the Constitution be recommended to Congress. Upon the move of the anti-constitutionalists to substitute another resolution, the constitutionalists won by the slender margin of eight votes out of a total of 168. Encouraged by this, they put the vote on the Constitution itself and, gaining one delegate, were successful in securing its adoption by a margin of ten.

In the very year of the adoption of the new Constitution, the French Revolution broke out. America really owed its liberty to French aid, and the King's financial and political difficulties in a large part resulted from this aid. Yet the Americans were at the outset almost unanimously in favor of the Revolution. As its more violent phases developed, many lost their early enthusiasm. An extreme difference of opinion developed, which really split the nation into two parties. Beveridge most interestingly shows this important development and the effect it had upon the internal politics of this country.

Excesses that even shocked Thomas Paine, the stormy petrel of revolutions, did not at all disturb Thomas Jefferson. His failure to bear arms in the Revolution and his hasty retreat, when he was governor, during Tarleton's Raid, had been slightingly referred to in the earlier parts of the

Life of Marshall. He now develops as the villain or Lucifer of Beveridge's work.

It was only in 1789, as the new national government began, that Jefferson returned from France. There he had been receiving news from Madison which led him to believe the Constitution was most popular. When he found a strong anti-nationalist feeling in America, he soon became the leading advocate of strict construction of the new Constitution. Indeed from that day to this, he has been looked to by many as a leading light in the construction of an instrument which was prepared while he was absent from the country. In contrast, those who drew it have been treated as incapable of construing it.

One result of the anti-nationalist feeling was the defeat of Marshall when he ran for the Senate at Washington's suggestion. The legislature shortly afterwards displayed its hostility to nationalism by an ominous address to Congress implying that the new National Government did not possess the confidence of the people and would not endure. Criticism of the Government extended to every one of its activities. To help the cause, Marshall declined Washington's appointment as District Attorney and instead ran again for the legislature.

The adoption of the first ten amendments to the Constitution somewhat calmed its opponents. But Hamilton's "First Report on the Public Credit" and its principal proposal that the state debts be assumed by the national government resulted in a criticism of it and of him which has not yet ceased. Actually Jefferson delivered three Southern votes to help pass the bill for the assumption of the state debts in return for Hamilton's rounding up enough votes to place the national capital where it now stands.

In the various attacks made by the Virginia legislature upon the Constitution, Marshall was always in a minority which gradually grew as the nation through that very Constitution became strong and prosperous. Jefferson wished to dispose of him by having him made a Supreme Court Justice. He attempted to diminish his prestige by saying that he was the tool of Hamilton's "flattery and solicitation". But by now Marshall had the largest practice in Richmond and could not be undermined or disposed of by elevation to the Supreme Court.

The rage of the anti-federalists denounced all acts under the new Constitution as unconstitutional and vilified the first President in unmeasured terms. Marshall came in for his share of abuse as being under obligations to Robert Morris, the father-in-law of his brother. He was even accused of being a gambler and drunkard.

The Jay Treaty of 1794 . . . *The Nation Saved from War*

Among the most bitterly denounced acts of the National Government was the Jay Treaty of 1794. By it, a number of trifling points were surrendered to the British. But the new and weak country was saved from war—far more imminent than was then realized—and permitted to grow strong in peace.

At this critical period, Washington offered John Marshall the office of Attorney General. He was unable to accept it. But he was again elected to the legislature, his name having been proposed against his objections. He found himself a member of an aggressively Republican legislature. A resolution of the House of Delegates condemned the Jay Treaty. Friends of Washington offered a resolution that his motives in approving the treaty met the entire approbation of this House and that he, "for his great abilities, wisdom and integrity, merits and possesses the undiminished confidence of his country". The word "wisdom" was stricken out by the anti-administrationists. The best the Senate could do was pass a new resolution which included the word "wisdom" and added that it did not mean to censure the President's motives as regards the Treaty.

Marshall was now obliged to decline appointment as Minister to France. Even when Washington's second term was drawing to a close and he had declined to run for reelection, the Virginia House of Delegates, despite Marshall's strenuous efforts, would not pass a resolution of gratitude in which the retiring President's actions were referred to as "wise". The leading anti-Washington paper referred to him as "the source of all the misfortunes of our country". All of this strongly influenced Marshall so as to increase his hostility to Jefferson, the leader of the Francophile extremists and critics of Washington.

Here Beveridge breaks off the narrative of national events for a chapter on Marshall as a man and as a lawyer. "His lax, lounging manners" were decried by Jefferson. They were a part of a completely simple nature. Another aspect of his nature was his pleasure in such unsophisticated diversions as quoit-throwing at the Barbecue Club, playing cards at Farmicola's Tavern and entertaining his fellow practitioners in his newly built Richmond house. His account book shows that his professional income was $1,960 in 1788, $2,130 in 1789 (the year in which he built his house), $2,400 in 1790, $2,200 in 1791, $1,200 in 1792, $1,150 in 1793. In 1794 he barely broke even and soon after gave up his account book. In 1797 the Duc de la Rochefoucauld-Liancourt reported his income as four or five thousand dollars per annum and not always that. At this period he argued 113 cases in the Court of Appeals in ten years and was the acknowledged head of the Virginia Bar.

Marshall was one of a syndicate headed by Robert Morris that bought the Fairfax lands, about 160,000 acres, in the Northern Neck. The financial difficulties of Morris placed a strain on Marshall who accepted the appointment as envoy to France largely because the salary was three times that of his professional income. The purpose of the mission, headed by Charles Cotesworth Pinckney and of which the other member was Elbridge Gerry, was to make some agreement to end the lawless seizure

of American ships by French privateers.

The head of France's Foreign Affairs was the fascinating and brilliant, but corrupt Talleyrand. He accorded the envoys a cool reception, which could be explained by Washington's refusal to receive him when in exile in America. The envoys were told some time would elapse before any conference with them would be possible.

In the interval, various persons asserting they were friends of Talleyrand, but not acting under his instructions, informed the envoys of the wrath of the Directory against the United States and of the means of placating it. These included a disavowal of any intention by John Adams to disparage the French and a loan to France, but above all a payment to Talleyrand of £50,000.

After alternative threats and assurances that they were not acting on orders of Talleyrand, the intermediaries found even when Talleyrand himself vainly used the threat of punishment by French partisans in America that no progress was being made. In America, however, the French enthusiasts were gaining in influence. Suddenly John Adams reported to Congress the corrupt efforts of Talleyrand's agents whom he designated as *X*, *Y* and *Z*. The X. Y. Z. Papers completely changed the American viewpoint. Marshall returned to Philadelphia in June, 1798, a little less than a year after his departure, and was enthusiastically received. The hopes of the Federalists rose, soon to be depressed by the Alien and Sedition Laws and by Adams' proper but politically injurious effort to settle the French difficulties with a second diplomatic mission.

Shortly after the passage of these laws, Marshall, at the earnest request of Washington, ran for Congress. About the same time, Jefferson prepared the "Kentucky Resolutions", adopted on November 14, 1798, declaring certain parts of the Alien and Sedition Laws to be invalid and tending to revolution and bloodshed. The fatal germ of the Civil War was contained in these resolutions. Those of Virginia likewise declared the unpopular laws to be unconstitutional, but merely requested the co-operation of other states to maintain the liberties reserved to the states.

Marshall campaigned against the Virginia Resolutions and in support of John Adams' second mission to France and of military preparedness. He would probably have been defeated, but for a falsehood circulated by the Republicans that Patrick Henry was opposed to him. When the old patriot heard of this, he made a stirring statement in favor of Marshall's candidacy. Without it, Marshall's slim majority of 108 would not have existed.

In Congress Marshall showed a patriotism transcending partisanship. He voted against his party for the repeal of one section of the Sedition Act. He also radically amended the Federalists' Disputed Elections Bill by which they hoped to remain in office if the country elections were adverse but close. In the Robins case in which Adams had delivered to the British a sailor wanted for murder on a British man-of-war, Marshall defended the President so ably that the Republican orators dared not attempt to reply to his unanswerable argument. He also unanswerably defended the administration's military preparedness. Finally his active six months in Congress included the shaping of the nation's first bankruptcy bill.

At this stage in Marshall's career, John Adams had one of his many cantankerous flare-ups. He forced the resignation of James McHenry as Secretary of War and dismissed Timothy Pickering, Secretary of State. Marshall was appointed Secretary of State and became practically acting President when Adams was called to Massachusetts by the illness of his wife. He showed his extensive knowledge of international law in a protest to the British which is also outstanding for the firm and dignified position it took on behalf of his country.

But the political tide was turning against the Federalists. Marshall's successor in Congress was of the opposite party. Hamilton attacked John Adams in an atmosphere of savage journalistic charges and counter-charges and general political confusion. The administration still controlled Congress. A Judiciary Bill making many desirable changes and increasing the federal districts and the judicial offices to be filled by faithful Federalists was passed. At the time the Chief Justice of the Supreme Court had resigned. The first Chief Justice, John Jay, declined the offer of his old post. On January 20, 1801, Marshall was appointed. Adams went on making appointments until nine o'clock of the evening of March 3, 1801.

Many years afterwards the story was first heard that Adams was signing and Marshall (who continued to act as Secretary of State) was sealing commissions until midnight of that day, when the new Attorney General with Jefferson's watch in his hand pointed out that the power of the President was at an end. So generally accepted was this tale, that it is now frequently said that Marshall himself was one of the "midnight judges". In fact, he had unobtrusively, six weeks before, accepted the post in which he was destined to render illustrious service by strengthening the newly formed United States and preparing the nation for its future role in world history.

The Capital in 1801 . . . *Confusion in a Wilderness*

The third volume of Beveridge's life begins with an account of the City of Washington. A few imposing governmental buildings and some hotels and shops stood amidst a number of log cabins and other small houses, with a forest on one side and a swamp on the other, the whole connected by roads which were mosquito-ridden quagmires in the rainy season and sources of clouds of dust in dry weather. The depressing physical surroundings were equalled by the governmental confusion seemingly

(Continued on page 766)

World Government:

A Reply to Ivan A. Bowen

by **Luther M. Carr** • *of the California Bar (Burlingame)*

▪ This is a reply to Ivan A. Bowen, of the Minnesota Bar, whose article in our February number took issue with the "internationalists" who would, Mr. Bowen declared, exchange our constitutional freedom for world government.

▪ As a member of the Section of International Law of the American Bar Association I ask the privilege of clarifying some misapprehensions expressed by Mr. Ivan Bowen, of Minneapolis, in his article in the February issue of the JOURNAL entitled, "World Government: A Threat to the Constitution". As evidence of my familiarity with the subject, may I add that during 1953 I was State President of the United World Federalists of California, Inc.

I am certain that Mr. Bowen's motives are sincerely patriotic, and I share with him his concern against a creeping encroachment on our constitutional rights and privileges by treaty, but when he ties this fear into the program of the world federalists and relates treaty provisions or United Nation's agencies to world government, his shaft falls wide of the mark.

His disparaging remarks regarding world government need to be answered because this issue may be vital to the survival of our civilization in this atomic age and will be a subject of much public discussion in connection with U.N. Charter review this year.

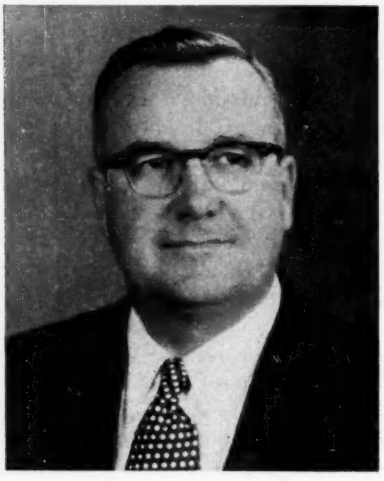
Lawyers, of all people, should agree that law and order are preferable to anarchy. Yet anarchy is the current political status in the international relationships of nations and citizens of the different nations. Consequently, resort to war is the ultimate method of settling disputes between sovereign nations.

Law and order have been established under the institutions of government at the national, state, county and municipal level in all civilized nations, and as a result, a fair semblance of peace is maintained within these political subdivisions.

It is obvious to all students of jurisprudence that order is the product of law, disorder is the product of anarchy. Law can only be the product of government—as Mr. Bowen points out, in the Declaration of Independence our forebears reminded us, "That to secure these rights [Life, Liberty and the pursuit of Happiness] Governments are instituted among men." World Federalists advocate a democratic method of producing law and order, a more representative world assembly than is provided under the current U.N. Charter, a court with compulsory jurisdiction, and with authority over individuals in crimes against the peace of humanity. (After the precedent set *ex post facto* in Nuremburg and Tokyo.) Furthermore, no rule of conduct enacted by a world assembly—no decree or judgment of a world court, will be respected in the absence of a sheriff—an international police force.

Only when all the people on this rapidly shrinking globe have created such an assembly, with universal membership of all nations, such a court, with an effective police force, and with such international authority, limited by a world charter or constitution, can the nations safely begin the gradual process of disarmament. Only then can income and other federal taxes be reduced. Only then will the dangers of H-Bomb "fall out", or cobalt coated H-Bombs, become a horrible nightmare of the past. Admiral Strauss closed his recent report for the Atomic Energy Commission by saying, "Until the possibility of an atomic attack against us is eliminated by a workable international plan for general disarmament, the study and evaluation of the effects of weapons which might be used against us and the improvement of our means of self-defense are a permanent duty of our government."

Not until international law and order have been created and put into operation can the dramatic vision of Roosevelt and Churchill, as expressed in the Atlantic Charter, come to pass.



Luther M. Carr is a graduate of Drake University (Des Moines, Iowa), and was admitted to the Iowa Bar in 1929. He served two terms as County Attorney in Iowa and later as Rent Attorney for the O.P.A. in San Francisco. He is now in private practice in California.

Assuredly, there are almost insurmountable problems to be overcome in the accomplishment of this objective. But when did Americans shrink from a tough job? We should adopt the war-time slogan, "The difficult we do immediately. The impossible takes a little longer." Or let us remember the ancient admonition in Proverbs 3:5, "Trust in the Lord with all thine heart; and lean not unto thine own understanding." Let us make the start. Let us proclaim to the rest of the world, America's willingness to sit down with our neighbors on the globe and explore this means of producing permanent world peace, of avoiding mass suicide, and leave the rest to the Almighty who must have had some such purpose in mind for America in His grand design. This offer has never been made. Yet most statesmen agree it must be the ultimate solution.

Mr. Bowen asks, must we "choose between freedom and world government"?

Definitely not. But in the opinion of a growing percentage of the American people, the choice is freedom, peace and security under international law and order, provided by a limited world federal government, or chaos, slavery—or the total destruction of civilization as we know it today—without it.

Mr. Bowen sympathizes with our young people in these turbulent times, with their hopes and dreams for the future. What hope for the future do they have in a world in which the richest country in it is repeatedly raising its debt level in order to produce arms that become obsolete almost as soon as they are stockpiled? In which our allies are faced with a choice between subsidy by our taxpayers, or trading with the enemy? In which science every month brings Moscow and Washington closer together in terms of air transportation, and has now created cobalt bombs that can destroy all mankind with ten explosions? In which the plans for the future of each young couple must be subjected to the danger and long delay of a training course in how to kill their fellow men *en masse* most efficiently? In which their civil rights are being constantly curtailed in the name of security? In which the most hopeful promise, is an indefinite era of world tension and Cold War? Is this Mr. Bowen's idea of a hopeful future?

I agree with Mr. Bowen, that international law and order should be brought about by constitutional amendment and not by any back door method, but I believe our best chance to hang on to government by law rather than by men is for mankind, who must necessarily live together on this globe, to create some enforceable law at the international level to protect the freedom of individual man wherever he may be. Even mighty America no longer dares to take the steps necessary to protect its citizens who are maltreated behind the Iron Curtain.

What next? Perhaps, as General Douglas MacArthur suggested in Los Angeles in January, the result would be magical if America would proclaim its willingness to cooperate in a search for a more equitable system of living together. Then it would be the Communists who would have to "put up or shut up".

If these ideas seem fantastic, remember, it is a fantastic world we're living in. But if they appear new and untried, one should read the *Federalist Papers* by Hamilton, Madison and Jay written in the 1780's. They sound like yesterday's newspaper.

Committee on Law Lists

■ The Standing Committee on Law Lists, since its release on December 31, 1954, of the Roster of Law Lists for 1955 publications, has issued Certificates of Compliance for the 1955 editions of the following publications:

April 4, 1955—RECOMMENDED PROBATE COUNSEL, published by Probate Counsel, Inc., 411 North Central Avenue, Phoenix, Arizona.

June 14, 1955—MARKHAM'S NEGLIGENCE COUNSEL, published by Markham Publishing Corporation, 265 Church Street, New Haven 10, Connecticut.

Administrative Law:

Let Him Who Hears Decide

by **Frank E. Cooper** · ***Professor of Law at the University of Michigan Law School***

▪ The rapid growth of administrative agencies within the last generation has caused innumerable problems. Typical of those which continually arise is the problem created by Morgan v. United States, in which the Supreme Court ruled that it was material error for an administrative agency head to issue an order without having heard oral arguments or considering the briefs. Certainly most lawyers will agree with the Court that no one in a judicial or semi-judicial capacity should decide without having considered both sides of the case. Yet the pressure of time and the heavy work load of many administrative agencies make the rule of the Morgan case an almost impossible requirement. Mr. Cooper's examination of the problem is cogent and suggestive.

▪ For nearly two decades, intensive efforts have been made to work out a practical solution to the problems posed by the decision in *Morgan* v. *United States*,[1] requiring the chief officers of administrative agencies to "consider and appraise" the evidence received in quasi-judicial proceedings.

A review of these efforts persuasively indicates that they have not been successful and that this failure has resulted in two unhappy effects: first, it has diminished the effectiveness of the agencies' performance of their intended functions; secondly it has deprived the Bar of the opportunity for proper participation in the process of agency adjudication.

The dilemma in which agency heads find themselves is well illustrated by the reported instance[2] of the Interstate Commerce Commissioner who found that over a period of two years he cast a vote every 12½ minutes of working time. Assuming that not all of these votes represented decisions in quasi-judicial cases, yet it seems apparent that the Commissioner could not have had much time to have "addressed himself to the evidence"[3] found in the records of the contested cases in which he participated. As early as 1939, the total pages of transcript taken in I.C.C. hearings exceeded 500,000 pages annually; and it seems unlikely that the total has diminished since that time.[4]

An attorney who for many years was on the general counsel staff of one of the largest federal agencies told the writer that when a new Commissioner was appointed, the newcomer would often approach his task with a determination that his vote in contested cases would be based not on staff recommendations but on his own independent study. He would accordingly request that the records of cases to which he was assigned be brought to his office, for his personal perusal. After a few weeks, the table in his office would overflow with the accumulation of transcripts, exhibits, statements of exceptions and supporting briefs in cases which the Commissioner had not found time to "master", although Commission vote thereon was imminent. Sometime thereafter, the new official would reluctantly concede the necessity of relying, to a greater extent than he desired, on the reports and memoranda prepared by staff assistants.

In short, it appears that present-day case loads render it impossible to achieve the type of personal mastery of the record contemplated by the Court which in deciding the *Morgan* case[5] held it error for the lower court to have stricken, as immaterial, that portion of a petition for review which asserted that the agency head made the administrative order "without having heard or read any of the evidence, and without having heard the oral arguments or having read or considered the briefs which the plaintiffs submitted". Commissioners are compelled to place principal reliance on memoranda, reports and recommendations for decision prepared by their assistants, whose training and experience are often much inferior to

1. 298 U.S. 468, 56 S. Ct. 906 (1936).
2. Davis, CASES ON ADMINISTRATIVE LAW (1951) page 423.
3. *Morgan* v. *United States*, 298 U.S. 468, 481.
4. Montague, *Reform of Administrative Procedure*, 40 MICH. L. REV. 501, 511 (1942).
5. 298 U.S. 468.

that of the Commissioners and whose suggested decisions are made without the benefit of having heard either the testimony or the arguments of counsel. The result is decision second-hand, twice removed.

Counsel representing the respondents in agency proceedings too often experience the frustration that is said to accompany the activity of punching a pillow. They present their evidence, and sometimes their arguments, to a hearing officer whose report may be for most practical purposes disregarded, or at least accorded second-rate importance, in the subsequent process of agency decision. They mail briefs to the agency, to be sure; but have no certain conviction whether their briefs will ever be read—or if so, by whom.

Sometimes (by no means always) counsel are accorded the privilege of oral argument before the agency. But thirty minutes is scarcely enough time to acquaint the Commissioners with the controlling details of a transcript that may run many hundreds of pages. Furthermore, oral arguments presented before the Commissioners may not be heard by the staff assistants who are chiefly responsible for the formulation of the agency decision.

Under such circumstances, the effectiveness of the participation of private counsel in the process of agency decision is unfortunately diminished. As every trial lawyer knows, the opportunity to cross verbal swords with the person who will ultimately write the decision—to learn by oral argument what issues principally concern him, to direct his attention to counsel's contentions respecting those issues, and to correct any misapprehensions which he may have formed—are all of crucial importance to effective advocacy. But this opportunity is denied counsel, in most agency proceedings.

These problems, to be sure, are nearly twenty years old. The following survey of current practices—which represents the best that well-intentioned agency heads have been able to do in undertaking to meet the challenge—indicates, it is believed, that there is no reasonable hope of achieving the high measure of performance contemplated by the Court in the *Morgan* case, so long as agencies continue to follow the practice of separating the trial procedure from the process of decision.

The goal envisaged by the Court in the *Morgan* case can be attained only if the present artificial divorce between hearing and adjudication is eliminated. The hearing officer is the only agency official who enjoys the normal judicial privilege of learning at first hand all the details of the case as the record is built up, and probing all possible implications of the evidence by frequent colloquies with trial counsel. His decision should stand as the initial decision of the agency. Appeal should be allowed from his decision to the full commission, but this appeal should be in the main restricted to those issues which are considered by an appellate court in reviewing the *nisi prius* decision of the trial judge.[6]

No claim of novelty is made for this suggestion. It was urged as long ago as 1942 by Messrs. Carl McFarland, now President of Montana State University, E. Blythe Stason, Dean of the University of Michigan Law School, and Arthur T. Vanderbilt, Chief Justice of the New Jersey Supreme Court, in their concurring report as members of the Attorney General's Committee on Administrative Procedure in Government Agencies. They formulated a suggested code of fair administrative procedure, which provided in part:

> Whenever . . . one or more members of the board or body which comprises the highest authority of the agency . . . does not preside at the taking of evidence, *all cases shall be heard and decided* by a "hearing commissioner" as hereinafter provided [Italics supplied].[7]

While many of the views of Messrs. McFarland, Stason and Vanderbilt later became incorporated in the provisions of the Federal Administrative Procedure Act,[8] their recommendation that power of initial decision be vested in the hearing officer was modified by the provisions of Section 8 of that Act, which gave agencies the option (in cases where the agency did not preside at the reception of evidence) of either (a) having the hearing officer make the initial decision or (b) having the record certified to the agency for initial decision.

Most federal agencies chose to adopt variants of the latter alternative. This choice necessitated the devising of means whereby the agency heads could rely on the aid of staff assistants in formulating decisions.

A brief review of the various methods adopted discloses the difficulties which result—both to the agencies and to counsel appearing before them—when a complicated process of "institutional decision", so-called, is substituted for the traditional judicial device of having the decision made by the officer who heard the testimony.

In all the following cases, information has been obtained either through correspondence with agency officers or by examination of published reports, believed to have been accurate when written. In some cases, the data are recent; in others, the reports are now two or three years old, and it is quite possible (indeed, in view of the constant interstitial change in refinements of agency procedure, it seems more than probable) that various details of the procedures described below have been changed in minor particulars. These deviations, however, are of no significance for present purposes.

National Labor Relations Board

The decisional processes of the National Labor Relations Board are described in a staff report to the Subcommittee on Labor and Labor-Management Relations of the Senate Committee on Labor and Public Welfare, prepared under the direction of Mr. Jack Barbash, staff director.

6. Save that in matters involving a broad measure of agency discretion, the Commissioners, sitting as an appellate tribunal, would have the right to superimpose their ideas as to underlying matters of policy committed by law (within stated limits) to their discretion.

7. Sen. Doc. 8, 77th Congress, 1st Session, page 237.

8. 60 Stat. 237, 5 U.S.C. §1001.

In unfair labor practice cases (where exceptions are filed to the recommended decision of the hearing officer, so that Board decision becomes necessary) the procedure may be outlined as follows:[9] The case is assigned by the executive secretary to one of the members of the Board, and the record is transmitted to that member's legal staff.

At the time to which the Barbash Report was directed (1951), each Board member had a legal staff of eighteen—comprising one chief legal assistant, three legal supervisors and fourteen legal assistants. One of these fourteen legal assistants is assigned to the particular case, and, working "under the supervision of a supervisor and the chief legal assistant," he undertakes a detailed review of the record. In connection with this review, a proposed decision is drafted. After this has been "cleared within the panel chairman's office," it is "circulated among the Board members who are part of the panel, and there it is reviewed by the respective legal staffs".

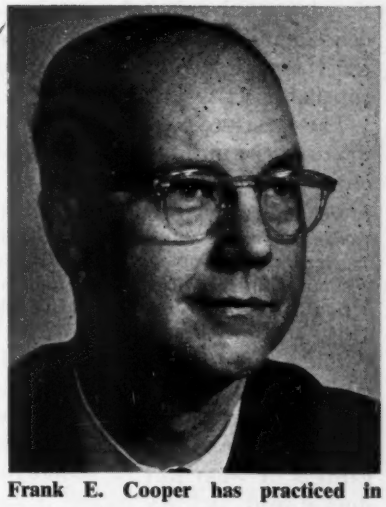
After the draft of a decision has been thus circulated, the case is considered at a meeting of the so-called subpanel, which is made up of the chief legal assistants of the three Board members participating in the panel. These chief legal assistants, according to the Barbash Report, have previously consulted with their principals and are fully informed as to the position of the Board members. To assist the chief legal assistants of the three Board members, there are also invited to attend the meeting of the subpanel the legal assistant who has read the record and his supervisor (who, presumably, supervised his reading of the record). If there is agreement at this meeting, "a proposed decision based on principles drafted and circulated will be assented to." If, however, one of the Board members feels that the case should be decided by the full Board, a memorandum is prepared to serve as a basis of discussion among the Board members themselves.

Thus, we see that as to cases decided by a three-man panel of the Board, the three Board members who comprise the panel rely in large measure upon their consultations with their chief legal assistants. The three chief assistants in turn must rely in large degree on the work of the one junior assistant who has read the record. Under the present practice, as pointed out in the Barbash Report, a detailed review of the record is made by only one person, the legal assistant attached to the staff of the Board member who heads the particular panel.

A lawyer is naturally curious, upon reading this disclosure in the Senate committee's staff report, as to whether the briefs filed with the Board are likewise read only by the junior assistant, and do not receive the attention of the members of the Board. The Barbash Report does not specify what the practice is in this respect. Perhaps we are to assume that the practice varies and that in cases which the Board members deem important they examine the briefs filed by counsel; although (bearing in mind their case load of some fifty or sixty decisions a week) it is difficult to imagine how members of the Board would find time to read each brief filed in each case.

Securities and Exchange Commission

The Commission is assisted in its review of the record by the Division of Opinion Writing. This Division prepares a digest of the record, which is studied by the members of the Commission, whose deliberations are in the main based on this digest, considered in connection with the hearing officer's report, the briefs of the parties, and (in some cases) oral argument of counsel. After examination of these materials, the Commissioners further discuss the case with members of the staff of the Division of Opinion Writing and arrive at a decision. A draft decision is then prepared by the Opinion Writing Division, and submitted to members of the Commission, who may approve it or suggest changes, which are agreed upon in a still further conference with members of the Opinion Writing staff.



Frank E. Cooper has practiced in Detroit since 1934 and is Professor of Law at the University of Michigan Law School. He is the author of Administrative Agencies and the Courts (1951), and Effective Legal Writing (1953). He is Chairman of the Committee on State Administrative Law of the Section of Administrative Law and served as a consultant to Task Group Three of the Hoover Commission Task Force on legal procedure and services in the executive branch of the United States Government.

The importance of the Opinion Writing staff's digest (and the conferences based on it) is highlighted by the decision in *Norris & Hirshberg, Inc.* v. *Securities and Exchange Commission*.[10] In that case, counsel for Norris & Hirshberg moved that the record submitted to the Court on judicial review be made to include the digest of the testimony prepared by the staff. It was alleged that at the oral argument of the case, the presiding Commissioner admitted that he and his associates did not undertake to read the entire record, but relied on the staff digest. It was further alleged that in the particular case, the digest did not, it was be-

9. The following paragraphs are lifted, with the permission of the copyright owner, from an article by the writer appearing in the February, 1953, issue of LABOR LAW JOURNAL, published by Commerce Clearing House.

10. (D. C. App. 1947), 163 F. 2d 689.

lieved, correctly reflect the actual evidence, but differed therefrom in material respects, to the detriment of appellant.

The Court refused to order that the digest be included in the record on appeal declaring:

> We are not concerned with the manner in which the Commission gives consideration to the record; it is enough if it certifies that consideration has been given and that its findings arise therefrom.

The Court further took the position that if the actual testimony in the record did justify the order, the Commission would be affirmed regardless of what sort of memorandum it read; and, *per contra,* if the evidence did not justify the order, it would be vacated.

The difficulty with this reasoning, from the viewpoint of counsel representing private parties haled before the Commission, is that in many cases there is "substantial evidence on the record considered as a whole" to support either a finding of guilt or a finding of innocence. Often, decision depends on the weight to be accorded conflicting testimony. It seems entirely likely that a carelessly prepared digest (or, much worse, a digest prepared with the *hope* of sustaining a finding supporting the Commission's contentions) might lead to a different decision than would be obtained if the digest had been carefully and accurately prepared—or if decision were made by one who had heard the witnesses, or read their testimony in full.

This case, it is thought, illustrates the great difficulty that inheres where the members of the agency must rely on the judgment and judicial abilities of junior staff assistants to weigh the evidence.

Federal Trade Commission

Oral argument (in cases where it is had) is the first step in the consideration of the case. Since the Commissioners, on hearing oral argument, are unfamiliar with the case, counsel for respondent must utilize his allotted time to acquaint the members of the Commission with the broad outlines of the case, and with the general nature of his principal contentions.

Thereafter, the Commissioner to whom the case has been assigned (on a schedule assigning cases to the individual Commissioners in rotation) reviews and studies the record. He has a legal adviser who may and often does assist in the review and study of the record. On the basis of this joint study, there is prepared a report and recommendation as to the disposition which should be made of the matter. This report is sent to the other members of the Commission for their consideration. The case is then brought up for conference discussion. At such conference one or more of the Commissioners will frequently request additional time to review and study the case. After a majority of the members of the Commission have agreed on a decision, the case is again assigned to an individual member (the same one who prepared the original recommendation if the decision is in accordance with his recommendation) for preparation of the formal decision.

This procedure appears to be substantially that which is used by many state supreme courts in the disposition of their judicial work. While it appears to be admirably suited to the functions of an appellate body, considering specific assignments of error to the *nisi prius* decision, grave doubts persist as to the appropriateness of this method in an agency which can and does exercise the powers of making original decision. The power of the Commission to supplant the initial decision of the hearing examiner relegates the latter's determination to a role of secondary importance. Would it not be better if greater stature were assigned the hearing examiner's initial decision, and the Commission were restricted to exercising substantially the same powers as are vested in appellate courts, on appeal from trial court decisions?

Interstate Commerce Commission

In the usual course, an assistant to one of the Commissioners reviews the record and evidence, checks the pleadings, reads the briefs which have been filed and studies the transcript of oral argument. As a result of this study, he prepares a proposed final report.

This proposed report is circulated among the Commissioners who are to vote on the case (three, if it is a Division case; eleven, if it is a full Commission case). It is also reviewed by a Board of Review composed of experienced examiners, who consider such matters as its consistency with prior Commission decisions, its effect on the rate structure involved, and other similar matters. The comments of the Board of Review are likewise circulated among the members of the Commission who are to participate in the decision of the case.

The proposed final report and the Review Board's comments thereon are then studied by each Commissioner with the assistance of his staff. If particular issues which have been raised by the exceptions previously filed appear significant, the assistants to the several Commissioners, or even the Commissioners themselves, may go beyond the staff report and comments, and make a personal study of some aspects of the pleadings or testimony. Quite often, the individual who prepared the report may be called in to answer questions regarding the facts of the case.

After this study by the Commissioners has been completed, the case is placed on a conference list to be considered on a specified date. At that conference, the views of the various Commissioners are brought forth and discussed. Sometimes, this conference results in the making of changes in the proposed final report which had been originally prepared by the staff. In other cases, the proposed report is approved.

It would seem that exigencies of time and the pressures of the Commission's heavy case-load require the Commissioners in the main to confine their independent study of the case to issues similar to those considered by the judges of appellate

(Continued on page 771)

Selective Service:

Finality of Draft Board Decisions

by Carl L. Shipley • *of the District of Columbia Bar*

The Universal Military Training and Service Act provides that decisions of local draft boards as to whether or not to defer registrants shall be "final', subject to appeal to special appeal boards and to the President. The word "final" in this statute, however, is not to be taken literally. The courts have construed it as limiting but not denying judicial review. The extent to which a registrant may obtain a judicial hearing on a disputed draft board decision is the subject of Mr. Shipley's article. The subject matter of the article is drawn from his experience as Hearing Officer for the Justice Department in determining conscientious objector claims in the District of Columbia.

Since 1917 the draft statutes have contained provisions seeking to give "finality" to the administrative decisions of the draft boards in classifying registrants and in determining their status.[1] The Universal Military Training and Service Act of 1951, which is the current draft law, contains the following provision:[2]

> The decisions of such local board shall be final, except where an appeal is . . . taken. . . . The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President. . . . the determination of the President shall be final.

The plain purport of the language contained in the act would seem to be that the administrative decisions of the local boards, appeal boards and the President are beyond the reach of judicial review. However, the Supreme Court of the United States has stated that "final" as used in the Act does not mean "final" in the ordinary sense,[3] leaving the extent of allowable judicial review in some doubt.

But first, who are these boards which have such power? The act directs the President, on recommendation of the governor or comparable official in each state, to establish one or more local boards in each county, consisting of three or more civilian members. The local boards have the power, within their respective jurisdictions, to hear and determine "all questions or claims with respect to inclusion for, or exemption or deferment from, training and service" under the draft law.[4] The only limitation on this authority is a right of appeal to an appeal board, likewise appointed by the President and composed of civilians. At least one appeal board must be established in each federal judicial district. Decisions of the appeal boards may be appealed to the President himself.[5]

Whether a man is to serve in the military forces often determines whether he shall risk death or injury, loss of career or business opportunity or violate a principle of religious conscience. And while Congress has the constitutional power to call everyone to the colors,[6] it has not done so. For instance, veterans, certain merchant seamen, certain aliens, members of the National Guard, the Vice President, all elected state officials, members of Congress and state legislatures, state and federal judges, ministers and students preparing for the ministry, certain categories of persons employed in industry, agriculture or other occupations, certain state and federal employees, certain doctors, dentists, druggists, veterinarians, scientists, certain persons with dependents, certain categories of persons found to be physically, morally or mentally defective, certain high school and college students and religious conscientious objectors are all entitled to deferment from military service under the Act.[7] It may be seen at a glance that in-

1. 40 Stat. 76 (1917); 54 Stat. 885 (1940); 62 Stat. 604 (1948); 65 Stat. 75 (1951), 50 U.S.C.A. App. Par. 460(b)(3) (1951).
2. 50 U.S.C.A. App., 460(b)(3) (1951).
3. *Estep* v. *U.S.*, 327 U.S. 114, 90 L. ed. 567; *Nugent* v. *U.S.*, 346 U.S. 1.
4. 50 U.S.C.A. App. Par. 460 (b) (3) (1951).
5. *Ibid.*
6. *Tyrrell* v. *U.S.*, 200 F. 2d 8; *George* v. *U.S.*, 196 F. 2d 445; *Warren* v. *U.S.*, 177 F. 2d 596; *Atherton* v. *U.S.*, 176 F. 2d 835; *Rase* v. *U.S.*, 129 F. 2d 204.
7. 50 U.S.C.A. App. Par. 456(h) (1951).

Carl L. Shipley received his B.S. from the Georgetown University Foreign Service School in 1942 and his LL.B. from Harvard in 1948. Engaged in private practice in Washington, he serves as Special Assistant to the Attorney General and is a professorial lecturer at the American University.

clusion or exclusion from one of these enumerated classes of darlings of the law can be the difference between life and death or the loss of all that one holds dear. Questions of deferment and classification must necessarily rest on facts, and the experience of mankind has recommended the necessity of determining the truth or falsity of alleged facts by a careful application of rules of judicial procedure and rules of evidence by persons trained in the law. Yet it is significant that the civilian draft board members need not be lawyers, or have any judicial experience; no real procedural safeguards are provided, and no application of evidentiary rules is suggested in the act. But among the favored classes, the conscientious objector is afforded an additional procedural step which contains the suggestion of a procedural safeguard. If his claim for exemption from military service is denied by the local board, and he appeals to the appropriate appeal board, the appeal board must refer the claim to the Department of Justice. The act provides that:[8]

> The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing.

After holding the conscientious objector hearing, the Department of Justice recommends to the appeal board that the claim be sustained or not sustained, as the case may be.

If a conscientious objector's claim to exemption under the Act has been denied and he has exhausted all of the administrative remedies available to him, to what extent may he resort to the courts for judicial review of the administrative decision denying his claim?

"Final" Decisions . . . "*Final*" *Does Not Mean Final*

As pointed out above, the act in terms makes the draft board decision "final". A Supreme Court Justice has recognized the import of the wording:[9]

> One need not italicize "final" to make final mean final, when nowhere in the Act is there any derogation of this Congressional command of finality. . . .

Fortunately, the most that can be said for the "finality" provision of the Act is that it reduces to some extent the scope of judicial review in conscientious objector cases.[10] Just how much and where is not entirely clear.[11] Needless to say this is an unsatisfactory posture of the law for the conscientious objector. Although exemption from military service results only from the grace of the Government,[12] once that grace has been exercised, the beneficiary of the exemption is possessed of a legal right. The present draft law categorically exempts the conscientious objector from service.[13] If a draft board improperly denies a registrant's claim to exemption on conscientious objector grounds and compels him to bear arms in violation of the tenets of his religious faith, it has sown the seeds of violence. The Sepoy rebellion in India in 1857 against British authority grew out of a violation of the religious beliefs of the native soldiers. History records numerous incidents of a similar sort, *e.g.*, the Thirty Years War in Germany in 1618. Thus, it is important in terms of the principles of orderly government that the scope of judicial review of draft board decisions in conscientious objector cases be as extensive as possible.

The methods by which a conscientious objector may bring an allegedly improper draft board decision into court for judicial review are severely limited. For instance, he may not bring an action to enjoin the local board from inducting him into the military.[14] Likewise, he cannot obtain an injunction in a federal court to restrain Selective Service officials from compelling his induction. Such legal actions have been determined to be "premature",[15] since the registrant has not "passed through the administrative processes leading to induction". Nor can a registrant whose claim to exemption is denied obtain judicial review of the draft board decision via the declaratory judgment route.[16] Such cases are said not to be based on an "actual controversy",[17] or the courts say they lack jurisdiction.[18] Conscientious objectors have resorted to the common law writ of certiorari as a technique to obtain judicial review of a draft board decision, but without avail, as it has been held that administrative decisions are not reviewable by certiorari.[19] And yet another unsuccessful approach has been the effort to fix civil liability for damages on Selective Service personnel for either malicious prosecution or violation of the Civil Rights

8. Note 7 *supra*.
9. *Estep* v. *U.S.*, 327 U.S. 114, 136.
10. See Shipley, *Conscientious Objection—A Legal Right*, 13 Fed. Bar Jour. 282 (1953).
11. See Davis, *Unreviewable Administrative Action*, 15 Fed. Rules Dec. 433, 434, for comparison with finality provisions of other statutes.
12. *U.S.* v. *Alvies*, 112 F. Supp. 618; *Local Draft Board No. 1* v. *Conners*, 124 F. 2d 388.
13. *Universal Military Training and Service Act of 1951*, §6(j), 50 U.S.C.A. App. Par. 456(j) (1951).
14. *Local Board No. 1* v. *Conners*, 124 F. 2d 388.
15. *Permutt* v. *Armstrong*, 112 F. Supp. 247.
16. *Hirsch* v. *Adair*, 113 F. Supp. 116.
17. *Meredith* v. *Carter*, 49 F. Supp. 899; also see note 15 above.
18. *Local Board No. 1* v. *Conners*, 124 F. 2d 388.
19. *Drumheller* v. *Berks Co. Local Board No. 1*, 130 F. 2d 610.

Act.[20] The courts have ruled that officers administering the draft law "are afforded personal immunity from civil actions for damages for acts done in relation to matters committed to them by law *although probable cause be absent and malice be present in their enforcement of the law.*"[21] (Italics added.) Attempts to obtain judicial review by actions in the nature of mandamus have also failed, on the ground that the Selective Service System must be kept free "from the delays and disruption incident to court interference prior to induction".[22] So much for the types of court proceedings that cannot succeed. Now for those that might.

Apparently the only methods by which a conscientious objector can obtain judicial review are:[23]

(1) To wait until he has been inducted, and then petition for a writ of habeas corpus, or

(2) Refuse to submit to induction and in the criminal prosecution for violation of the Act which follows, defend on the ground that the board's action was without basis in fact or contrary to law.

Having resorted to either of these drastic expedients, the next question is one of just how much judicial review the registrant can expect. The Supreme Court of the United States has attempted to mark the boundaries of available review as set by the "finality" provision of the Act:[24]

> The provision making the decisions of the local boards "final" means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classification made by the local boards was justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the local board is reached only if there is no basis in fact for the classification which it gave the registrant.

This decision clearly sets forth the rule that a reviewing court will set aside a draft board classification unless it is supported by evidence of some sort. How much evidence indicating that a conscientious objector's claim is not bona fide is required to preclude court review of a draft board denial of an exemption claim? This critical quantum has been defined as a "substantial basis for the classification order".[25] It is reasonably certain, then, that the conscientious objector is entitled to have the issue of factual basis for a draft board decision submitted to a trial court for judicial review. But " . . . when a court finds a basis in the file for the board's action that action is conclusive".[26]

In short, the Supreme Court would seem to have partially nullified the "finality" provision of the Act by allowing a certain amount of judicial review for draft board decisions, corresponding in kind, if not degree, to the review given other administrative orders, *i.e.*, a review of the record to determine whether the administrative decision is based on competent evidence.[27] However, as pointed out above, the conscientious objector is at a disadvantage in that he is not permitted any direct judicial review of his classification order,[28] but must raise the issue of underlying evidence collaterally in habeas corpus or criminal proceedings. Thus, while he can obtain a certain amount of review, he cannot obtain it by the same method as is the case with other administrative decisions. Further, while the draft board decision is subject to collateral judicial review, the courts will not apply the same test to determine whether the decision is adequately supported by evidence as in other administrative decisions. In the ordinary administrative decision the courts insist that it be supported by "substantial evidence."[29] In reviewing draft board decisions the Supreme Court has stated categorically, "Nor will the courts apply a test of 'substantial evidence' ".[30] How much evidence, then, must a draft board have in the record before it is justified in denying a conscientious objector's claim? The Supreme Court has said:[31]

> . . . the courts may properly insist that there be some proof that is incompatible with the registrant's proof of exemption.

Just how much is "some" evidence awaits further judicial interpretation. For the moment, at least, it is more than none and less than "substantial". Whether an administrative order based on less than substantial evidence is unconstitutionally arbitrary remains to be seen.

The conscientious objector whose claim to exemption is improperly denied by a draft board can be saved on judicial review. A wrong decision may not be final. Of course " . . . exemption is a matter of grace, and the selective service registrant bears the burden of clearly establishing a right to the exemption."[32] Once he has made a prima facie case, the draft board must come forward with some evidence to rebut the presumption that the conscientious objector is entitled to exemption,[33] if it wishes to deny the claim. Otherwise it will fall into the error of having the decision reversed as being based only on suspicion and speculation.[34]

However, local boards are not bound by traditional rules of evidence,[35] they may make their case with hearsay, opinion, affidavits, self-serving statements, and other questionable evidence, for whatever it is worth.

In conclusion, it may be said that the conscientious objector is assured

20. 8 U.S.C.A. 47.
21. *Gibson* v. *Reynolds*, 172 F. 2d 95.
22. *U. S.* v. *Mancuso*, 139 F. 2d 90.
23. *Ex parte Fabiani*, 105 F. Supp. 139; *Estep* v. *U.S.*, 327 U.S. 114; In Re *Abramson*, 196 F. 2d 261; *Witmer* v. *U.S.*, 348 U. S. 375.
24. *Estep* v. *U.S.*, 327 U.S. 114, 122.
25. *Cox* v. *U.S.*, 332 U.S. 442, 453.
26. See Note 25 *supra*.
27. For example, findings of the Federal Trade Commission are final if supported by evidence, *FTC* v. *Army & Navy Trading Co.*, 88 F. 2d 776; *National Labor Relations Board* findings of fact are conclusive if supported by evidence, *N.L.R.B.* v. *Arcade Sunshine Co.*, 118 F. 2d 49; findings of an administrative agency such as Public Utilities Commission may not be set aside by a court where evidence supports them, *Washington Gas Light Co.* v. *Byrnes*, 137 F. 2d 547; as to Federal Communications Commission, see *Mansfield Journal* v. *FCC*, 180 F. 2d 28; as to Federal Power Commission, see *Montana Power Co.* v. *FPC*, 185 F. 2d 491.
28. *Dickinson* v. *U.S.*, 346 U.S. 389, 98 L. ed. 92, 95.
29. See cases cited in footnote 27 *supra*.
30. *Dickinson* v. *U.S.*, 346 U.S. 389, 98 L. ed. 92, 97.
31. Note 30 *supra*; but see 68 HARV. L. REV. 168 for a different approach.
32. Note 30 *supra*.
33. Note 30 *supra*; cf. *U.S.* v. *Simmons*, 213 F. 2d 901; *Weaver* v. *U.S.*, 210 F. 2d 815.
34. Note 30, 33 *supra*, See Shipley, *Conscientious Objection: A Problem of Proof*, 25 OKLA. BAR JOUR. 1596.
35. Note 30 *supra*.

of sufficient judicial review to insure that a purely arbitrary denial of his claim to exemption will be reversed. This is important when it is considered that his lot is often to be criticized, infrequently to be understood, seldom to be sympathized with by draft board members who do not share his views. And, too, the courts insist that he be given a fair hearing and opportunity to present his claim to exemption.[36] However, in a matter so important as conscience, the "substantial evidence" rule should apply. Perhaps the Supreme Court will further limit the "finality" section of the Act to bring this rule into full play.

36. *Eagles* v. *U.S. ex rel. Samuels*, 329 U.S. 304, 312; *U.S.* v. *Nugent*, 346 U.S. 1; *Witmer* v. *U.S.*, 348 U.S. 375; *Sicurella* v. *U.S.*, 348 U.S. 385; Simmons v. *U.S.*, 348 U.S. 397; *Gonzales* v. *U.S.*, 348 U.S. 407.

Second Regional Meeting—Cincinnati

■ The verdict of lawyers and judges attending the Association's Regional Meeting in Cincinnati June 8 to 11 was that it was one of the most profitable and enjoyable held thus far. Registrants for the "Big 7" meeting in the Netherland Plaza Hotel came from the States of Ohio, Indiana, Illinois, Tennessee, Michigan, Kentucky and West Virginia.

Perhaps the outstanding characteristic of the Cincinnati meeting, of which Grauman Marks was general chairman, was the variety of attractions, professional and social. On the professional side there were top-notch institutes and workshops on trial tactics, taxation, corporation, administrative, labor and municipal law as well as on traffic courts and legal assistance to servicemen. On the social side there were such events as an old-fashioned showboat melodrama by the famed Hiram College Players, an "Alt Heidelberg" beer party and dance, and an evening of "open house" private dinner parties for the visiting lawyers in the homes of Cincinnati attorneys. There also was a full schedule of special events for ladies. The Ohio State Bar Association was host at a cocktail party for all registrants.

Featured speakers came from government, the judiciary and the legal profession. Included were United States Senators Estes Kefauver and Strom Thurmond, Solicitor General Simon E. Sobeloff, Assistant Secretary of State Thruston B. Morton and Judge Paul W. Brosman, of the United States Court of Military Appeals. From the American Bar Association, President Loyd Wright, President-Nominee E. Smythe Gambrell and Chairman John D. Randall of the House of Delegates had prominent roles. At the opening Assembly session presidents of the state bar associations of the participating states spoke briefly.

Another feature of the Assembly session was the recognition of three of the senior members of the Association in the region. Two of them were present: Morison R. Waite, 88, of Cincinnati, a member of the Association since 1914 and a grandson of the late Morrison R. Waite, of Toledo, Ohio, former Chief Justice of the United States, and William H. Wolfe, 77, of Parkersburg, West Virginia, a member of the Association for fifty-two years. A third senior member recognized, but unable to be present, was William Marshall Bullitt, 82, of Louisville, Kentucky, a member of the Association continuously since 1900.

The third day of the program, on Saturday, a "Fair Trial and Free Press" panel attracted one of the largest audiences of the meeting. Participants were United States Circuit Judge Florence E. Allen, of Cleveland, Richard P. Tinkham, of Hammond, Indiana, Chairman of the Public Relations Committee, and J. Russell Wiggins, managing editor of the *Washington Post and Times Herald*. United States Judge Alexander Holtzoff of the District of Columbia presided as moderator.

This was the second regional meeting on the 1955 calendar. The third will be held October 12-15 in Minneapolis-St. Paul for the Northwest region embracing Iowa, Minnesota, Montana, Nebraska, North Dakota, South Dakota and Wisconsin. The fourth and final regional meeting of the year will be in New Orleans, November 27-30, for the Deep South states of Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, Oklahoma, Tennessee and Texas.

Osborne Photographers

(Left to right) Morison R. Waite, John D. Randall, Chairman of the House of Delegates, and William H. Wolfe.

The Hoover Commission Report:

Improvement of Legal Services and Procedure

by **Whitney R. Harris** · ***Former Executive Director of the American Bar Association***

▪ This is the concluding installment of Mr. Harris's summary of the study of the report of the Commission on Organization of the Executive Branch of the Government on legal services and procedure. Parts I and II of Mr. Harris's summary appeared in the June and July issues of the Journal.

▪ The increasing scope and complexity of administrative functions of the Federal Government have given rise in recent years to proposals for the creation of a permanent office to study and recommend improvements in administrative procedure. The Attorney General's Committee on Administrative Procedure recommended in 1941 that an Office of Federal Administrative Procedure be established to examine critically the procedures and practices of agencies, to receive suggestions and criticisms from all sources and to collect and collate such information.[58] The first Hoover Commission urged that the Administrative Management Division of the Office of the Budget should perform a similar function.[59] And the final report of the President's Conference on Administrative Procedure proposed the establishment of an Office of Administrative Procedure to perform continuous studies of administrative procedures, initiate co-operative efforts among agencies to develop uniform rules, collect and publish facts and statistics concerning the procedures of agencies, and assist agencies in the formulation and improvement of administrative procedures.[60] Common to all these proposals was the concept that the powers of the proposed office should be primarily advisory.

While, upon the basis of its study, the task force concurred in the establishment of such an office, it felt that to be fully effective it should have mandatory as well as advisory powers. Having already advocated the creation of an Office of Legal Services and Procedure within the Department of Justice to administer the career legal service and perform duties pertaining thereto, the task force proposed that additional functions be conferred upon that office in procedural matters.

The task force found that the principal publication media of agencies and departments of the executive branch, the *Federal Register* and the *Code of Federal Regulations*, were losing effectiveness by the publication of many rules and regulations of limited interest. In some cases, statutes have been copied at length in the Code. In one year sixty separate notices, many of them of considerable length, were published in the *Register* on the subject of limitations on the shipment of California and Arizona lemons. Both the *Register* and the *Code* have become enormous in size. The *Federal Register* contains 8,000 pages each year. The 1949 edition of the *Code* had 23,454 pages, and the supplements and revised volumes to June 30, 1954, an additional 18,213 pages.

In the light of these facts, the task force proposed that the Office of Legal Services and Procedure be given authority to determine whether the publication of any rule, regulation, opinion, order or other written statement is required under the law, and to permit or direct any agency to use a short form or alternative method of public information where notice is published in the *Register* and the office certifies that the short form or alternative method is adequate to inform the public. Properly utilized, this authority could make the *Register* and the *Code* highly readable and useful publications.

Methods of accomplishing greater uniformity in agency rules of practice and procedure were studied by the task force. It found the principal difficulty to be that rules are drafted by each agency or department, without any central supervision in the executive branch and often without any central supervision within the

58. Sen. Doc. 8, 77th Cong., 1st Sess. 123 (1941).
59. *Report on Regulatory Commissions*, pages 10-11 (March, 1949).
60. *Report of the Conference on Administrative Procedure Called by the President of the United States* on April 29, 1953, pages 3-4 (April 1955).

agency. The task force proposed that agencies be required to file promptly with the Office of Legal Services and Procedure the rules of substance and procedure adopted by them and that statutory authority be given the office to require agencies to comply with directives for the simplification, clarification and uniformity of such rules.

The Commission concurred in these important proposals. It recommended that an Office of Legal Services and Procedure be established within the Department of Justice to assist agencies in simplifying, clarifying and making uniform, rules of substance and procedure; to insure agency compliance with statutory public information requirements; and to receive and investigate complaints regarding legal procedures and to report thereon to the authorities concerned.

IV. Transfer of Judicial Functions of Administrative Agencies to the Courts

The first official act of the Constitutional Convention of 1787 was the adoption of a resolution that a "national Governt. ought to be established consisting of a supreme Legislative Executive & Judiciary".[61] As Mr. Justice Story later wrote in his commentaries, ". . . from this fundamental proposition sprang the subsequent organization of the whole government of the United States".[62]

Of course, the doctrine of the separation of powers was not first conceived at Philadelphia. It can be found in the writings of Aristotle and Cicero, of Locke and Montesquieu, and of Blackstone. It was prevalent in the political philosophy of the English people from whom we had taken our legal system. Sir William Holdsworth has written: "If a lawyer, a statesman, or a political philosopher of the 18th Century had been asked what was, in his opinion, the most distinctive feature of the British constitution, he would have replied that its most distinctive feature was the separation of powers of the different organs of the government."[63] While the doctrine did not originate in America, it was most clearly stated in the Constitution of the United States and has been most firmly adhered to in this country. Of it, the Solicitor General of the United States, Simon E. Sobeloff, said at the 1954 Annual Meeting of the American Bar Association:

> The very principle of the separation of powers—so basic in our form of government—is predicated on the concept that to declare a rule is one function and to apply it to specific cases is a distinct function; and that any attempt to combine the two is likely to prove unwise and dangerous.[64]

The chief characteristic of the administrative agency, which has come into prominence as a primary instrumentality of governmental control and regulation in the first half of the twentieth century, has been a commingling of executive, legislative and judicial powers within a single body, contrary to the historical concept of the separation of governmental powers in American polity. To the solution of this problem the task force gave its best efforts.

It concluded, preliminarily, that the problem could not be solved at the appellate level. From time to time, over a period of nearly twenty years, bills have been introduced in Congress to establish a specialized appellate court to review administrative decisions. The task force felt that superior judicial administration and more certain and uniform interpretation of constitutional and statutory provisions would be provided by retaining appellate review of administrative cases in courts of general jurisdiction. "The fact that they decide a wide variety of cases and controversies gives them the breadth of knowledge and understanding of the law which best assures sound review of administrative decisions."[65] The task force did not favor vesting judicial review in an administrative court.

The problem, as it seemed to the task force, lay not at the appellate, but at the trial level. It concluded that separation of powers could be achieved in various ways:

(1) Within agencies, persons responsible for hearing and deciding cases may be separated from those responsible for investigation and prosecution.

(2) Independent executive tribunals may be established.

(3) Judicial functions of agencies may be transferred to courts of special jurisdiction.

(4) Judicial functions of administrative agencies may be transferred to courts of general jurisdiction.

The task force submitted that in every case of administrative adjudication there should be, at the least, an internal separation of functions by the use of hearing officers who are independent of investigative and prosecuting officials. Beyond that, depending upon stage of development, the adjudicative process may be committed to an independent executive tribunal, removed to a court of special jurisdiction or transferred to the courts of general jurisdiction. "The trend, however, should be in the direction of the removal of adjudication from the administrative to the judicial level."[66]

On the basis of the study which it made of existing regulatory agencies, and the judicial functions performed by them, the task force proposed: first, that wherever practicable such typically judicial remedies as the imposition, remission or compromise of money penalties, the award of reparations or damages and the issuance of injunctive orders be transferred to the ordinary courts; and, second, that an Administrative Court of the United States be established at the trial level with jurisdiction in the fields of trade regulation and taxation.

The Commission concurred in these far-reaching proposals. It recommended that Congress inquire into the feasibility of transferring to

61. 1 Farrand, THE RECORDS OF THE FEDERAL CONVENTION, (New Haven, Yale University Press, 1934) page 35; DOCUMENTS ILLUSTRATIVE OF THE FORMATION OF THE UNION OF THE AMERICAN STATES, (Government Printing Office), page 122.
62. 1 Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (4th edition, Little, Brown & Co. 1873), page 378.
63. 10 Holdsworth, HISTORY OF ENGLISH LAW, (Boston, 1938) 713.
64. 41 A.B.A.J. 13-14 (1955).
65. Task Force Rep., page 239.
66. Task Force Rep., page 240.

the courts certain judicial functions of administrative agencies, such as those referred to in the task force report, wherever it may be done without harm to the regulatory process. And it recommended that an Administrative Court of the United States be established with jurisdiction not only in the fields of trade regulation and taxation, but also in labor relations.

The task force did not propose an Administrative Court of general jurisdiction to hear a variety of cases for administrative agencies, but rather a court of special jurisdiction with limited and clearly defined authority. The task force proposed that initially there should be only two sections. But it was contemplated that the court would provide an instrumentality to which, from time to time in the future, additional adjudicatory functions in special areas might be transferred by the creation of new sections.

The task force did not consider that the Administrative Court would necessarily be the final step in the removal of adjudicative functions from agencies to the courts. It recognized that some functions might eventually be removed from the Administrative Court to courts of general jurisdiction. "The Administrative Court thus would constitute the primary instrumentality to serve the intermediate stage in the evolution of administrative adjudication from agencies to courts of general jurisdiction."[67]

The task force proposed that the Department of Justice should represent the United States before the Administrative Court in the absence of statutory authority conferred upon agencies to be represented by their own counsel. While it recognized that the Administrative Court would determine the qualifications of persons who would be permitted to practice before the court, the task force proposed that reasonable protection be given non-lawyers who have an equitable claim to continuation of representation in which they have engaged and established their principal means of livelihood.

The task force was unanimous in proposing tax and trade sections in the Administrative Court. It also considered proposals for labor and immigration sections. Of the sixteen members and consultants of the task force, all but two favored the labor section and all but five favored the immigration section. Since the Commission recommended that the court have tax, trade and labor sections, the proposals of the task force on the organization of the court will be considered upon that premise.

The Administrative Court would have a chief judge, and each section a presiding judge. The chief judge and the presiding judges would constitute collectively the Council of the Administrative Court which would meet from time to time, upon call of the chief judge, to survey the condition of business in the court. The council would prepare plans for the assignment of judges to sections, review the calendars of each section and submit suggestions in the interest of uniformity and expedition of business.

The Administrative Court would have twenty-two judges. The sixteen judges of the Tax Court would be appointed to and constitute the tax section. Three judges would be appointed to and constitute the trade section, and three, the labor section. All judges would be appointed by the President, by and with the advice and consent of the Senate. The court would be provided with a sufficient number of court commissioners to enable each section to conduct its business expeditiously.

While the principal administrative office of the court would be in Washington, D.C., the judges and commissioners would hear cases in the localities most convenient to the parties and best suited to the dispatch of business. The council would appoint the clerical staff, marshals and deputies. The master calendar would be maintained in the administrative offices of the court.

Judges would possess all the powers of judges of United States district courts for preserving order and compelling the attendance of witnesses and the production of evidence. Proceedings would be governed by the rules of civil procedure for the United States district courts to the extent applicable. The court would be served by the Administrative Office of the United States Courts. All decisions of the court and its sections would be subject to review in appropriate United States courts of appeals.

The Administrative Court of the United States, as proposed by the task force, would constitute a trial court of special jurisdiction within the established federal judicial system. Its status would be comparable to that of the Court of Claims. It would not exercise jurisdiction now conferred upon any federal court. Nor would it affect the federal appellate judicial system. The task force was very clear in its view that the jurisdiction of the court should be original and not appellate. The Commission, however, recommended that Congress consider whether the trade and labor sections of the court should have original or appellate jurisdiction.

Tax Section. The Tax Court is a purely judicial body located for historical reasons within the executive branch of the Government. It performs the same functions in tax cases as the United States district courts and the Court of Claims, depending upon whether the taxpayer elects to pay his tax and sue for recovery or to default in payment and sue for redetermination. The task force observed that the "perpetuation of an executive tribunal to exercise exclusively judicial functions constitutes a continuing and serious violation of the doctrine of separation of governmental powers,"[68] and it proposed the creation of the tax section within the Administrative Court to have the same organization, jurisdiction and procedure as the present Tax Court, and with the same right of appeal from its decisions. The Commission fully concurred in these proposals.

Trade Section. The Department

67. Com. Rep., page 87.
68. Task Force Rep., page 256.

of Justice has primary responsibility for enforcement of the antitrust laws of the United States. The Federal Trade Commission has similar authority in respect to unfair methods of competition and unfair and deceptive practices in trade and commerce. Several other agencies have like authority in their fields of special competence. Among these are the Interstate Commerce Commission, the Federal Communications Commission, the Civil Aeronautics Board, the Federal Reserve Board, the United States Tariff Commission, the Federal Power Commission, the Department of the Interior and the Department of Agriculture. Typically, the enforcement procedure is the cease and desist order enforced by supplementary judicial action.

The cease and desist order is, in effect, an administrative injunction. While it is not self-enforcing, the order usually is accorded *prima facie* validity in proceedings for enforcement. The task force felt that this type of order should be issued in the first instance by a court which would be able to enforce the order directly, without necessity for a separate proceeding, as at present. It proposed that the several agencies now authorized to issue such orders conduct the investigation and prosecution of actions in the trade section of the Administrative Court. Other functions, including rule-making, industry conferences and compliance proceedings, would not be affected by conferring this jurisdiction upon the trade section. The Commission agreed with this proposal in its entirety.

Labor Section. The members of the task force who proposed a labor section within the Administrative Court felt that, in principle, there was little difference between the cease and desist order used in labor-management cases and that used in trade regulation. Only one agency, the National Labor Relations Board, has authority to issue such orders in labor relations whereas several agencies have that authority in trade regulation. The recommendation to establish a labor section in the Administrative Court would affect only the formal adjudicatory functions of the board. It would continue its activities in the certification of labor unions, the holding of elections and the determination of conflicts over representation. It would receive and investigate charges of unfair labor practices and would seek to adjust such charges by conference and agreement. In proceedings before the labor section, the Board would be the prosecuting agency and would retain responsibility for observing compliance. The effect of the proposal would be to transfer to the judiciary the hearing of formal charges of unfair labor practices and the issuing of injunctions to restrain such practices as were found to be unfair. The injunctions would be enforceable directly in the court which issued them. The Commission agreed with this proposal.

The recommendation of the Commission for the establishment of an Administrative Court of the United States constitutes the most significant result of the study and report of the task force. It offers a fundamental solution to the difficult problem of accommodating twentieth-century activities of government with eighteenth-century principles of government. It points the way toward the restoration of the judiciary as the sole branch of the government responsible for adjudication, without endangering the primary regulatory responsibilities of agencies and commissions. And it provides an instrumentality to which adjudicative functions of administrative bodies may be transferred as such functions attain identification and maturity in the future.

V. Hearing Commissioners

Probably no aspect of administrative practice and procedure has received the attention, in recent years, that has been given to the status of those officers of the executive branch who conduct administrative hearings. Except where statutes provide for special boards or officers, or agencies themselves preside, adjudicative functions under the Administrative Procedure Act are conferred upon hearing examiners.[69] The relationship of the hearing examiner to the agency he serves has yet to be adequately defined. Fundamentally, in the view of the task force, the difficulty has been that the hearing examiner has been considered to be an executive rather than a judicial officer. As such, he has been expected to execute administrative policy in the determination of cases assigned to him. Only by giving the hearing examiner judicial status may he be expected to perform a truly judicial function.

The task force studied this problem intensively and considered at length various proposals which have been offered to solve it, such as appointment of hearing examiners by the President, or establishing control over them through an Office of Administrative Procedure. After considering all such proposals, the task force arrived at three basic conclusions:

(1) Primary personnel supervision of hearing commissioners should be given to a Chief Hearing Commissioner, appointed by the President by and with the advice and consent of the Senate, who should be attached to a judicial rather than an executive office;

(2) The Chief Hearing Commissioner should appoint all hearing commissioners, subject to the approval of a presidentially appointed non-partisan advisory committee composed of persons directly interested in the appointment of highly qualified persons to hearing commissioner positions; and

(3) Hearing commissioners should be assigned and recalled by the Chief Hearing Commissioner to serve efficiently the hearing requirements of all agencies.

Next to the Administrative Court of the United States, this is the most important proposal of the task force. It converts the hearing examiner—an executive official—into a hearing commissioner—a judicial officer; it removes the appointment and assign-

69. 5 U.S.C. §1006 (1952).

ment of these officers from agencies; and it assures that hearing commissioners shall have the status and independence of judgment of administrative trial judges.[70]

The task force took note of differences in the difficulty of work now performed by hearing examiners. There has been a consistent trend in recent years toward reducing the number of examiner grades. Only two agencies now have more than two grades. The task force proposed that senior hearing commissioners and hearing commissioners be appointed, the former to handle the more difficult cases. The two grades would have different compensation and tenure, only senior hearing commissioners serving during good behavior.

The task force proposed that persons serving as hearing examiners be given first opportunity to be appointed hearing commissioners. Removals, other than for expiration of the terms of hearing commissioners, would be for cause after hearing before judges of the Administrative Court.

Hearing commissioners would be the only officers performing judicial functions for agencies and they would perform such functions exclusively. The task force recognized the desirability of experience in special fields, and proposed that commissioners be permitted to serve for long periods in single agencies so as to acquire expert ability in conducting specialized proceedings.

The Commission concurred with the task force in these important proposals. It recommended that hearing examiners be replaced by hearing commissioners who are completely independent of the agencies whose cases they hear, who are appointed by an authority other than such agencies and, to the extent possible, assigned to one agency on a continuing basis. It further recommended that hearing commissioners be placed under the administrative control and direction of the Administrative Court of the United States, their tenure, status, compensation and removal to be fixed by law.

VI. Conclusion

The report of the task force was predicated upon the studies made by its five task groups and their consultants.[71] Task groups 1 and 5 were primarily responsible for the portion of the report on legal services; task groups 2 and 3, administrative procedure; and task group 4, representation before agencies. The full membership of the task force considered, and passed upon, the report as a whole. The labor and immigration sections of the Administrative Court, while supported by a majority of the task force members, were not submitted as task force proposals. No dissents or reservations were filed by any member of the task force with respect to other task force proposals.

The Commission's action on the task force report was marked by similar general agreement. Only with respect to amendments of the Administrative Procedure Act was there significant difference of opinion. Six members of the Commission declined to vote for these recommendations because of possible increase in governmental expenditures and other consequences. These members felt that the task force proposals for the improvement of administrative procedure should be submitted to the Congress without Commission action.

All of the Commissioners supported the recommendation for making the Tax Court a court of record. Two Commissioners expressed reservations with respect to the trade and labor sections of the Administrative Court. The Commissioners were unanimous in the recommendations for change in the status of hearing commissioners. Only one Commissioner expressed reservations upon other recommendations.

The task force proposed legislative and administrative implementations of its proposals. It drafted two bills—a Legal Services Act and an Administrative Code. The Legal Services Act contains provisions relating to the Department of Justice, the career Legal Service, the Department of Defense and the Judge Advocate General's Corps for the Navy. The Administrative Code constitutes a complete revision of the Administrative Procedure Act and includes titles on definitions, procedure, office of legal services and procedure, administrative court of the United States, hearing commissioners and appearance and representation. This legislation, the sectional analyses thereof and related administrative implementations constitute 117 pages of the task force report. The bills were drafted with great care by the task force and constitute an accurate statutory restatement of its proposals.[72] Since the Commission did not concur with the task force on every proposal, or on the phrasing of several proposals, the task force legislation has been revised by the Commission's legislative counsel. The revised legislation undoubtedly will be considered by the Congress, although it is possible that some of the recommendations will be implemented through reorganization acts.

Underlying the proposals of the task force and the recommendations of the Commission were two dominant doctrines to which references may be found, sometimes expressly, more often indirectly, in the reports —the doctrine of the supremacy of law and the doctrine of the separation of powers. The report of the task force, the suggestions which it made for the improvement of the processes of law in the executive branch of the Government and the recommendations of the Commission based thereon reflect respect for and adherence to these traditional concepts of American political philosophy.

---

70. It was partly in consideration of this change in the status of hearing examiners that the task force proposed that commissioners be empowered to issue initial decisions subject to limited agency review.

71. Task group 1: Ross L. Malone, Jr., *chairman*, Elbert P. Tuttle, Edward L. Wright, and Farley W. Warner, *consultant;* Task Group 2: Carl McFarland, *chairman*, Albert J. Harno, and Bernard Schwartz, *consultant;* Task Group 3: E. Blythe Stason, *chairman*, Herbert W. Clark, Harold R. Medina, and Frank E. Cooper, *consultant;* Task Group 4: Reginald Heber Smith, *chairman*, David F. Maxwell, James M. Landis, and A. James Casner, *consultant;* Task Group 5: David W. Peck, *chairman*, Cody Fowler, and James M. Douglas.

72. The bills, with minor modifications, have been introduced in the House of Representatives by Representative Frank Thompson, Jr., of New Jersey, as H. R. 6114 and H. R. 6115.

Judicial Standing in Subsidy Cases:

Availability of Review Should Be Expanded

by Milton Eisenberg · *of the District of Columbia Bar*

■ **There is an understandable tendency on the part of courts and administrative agencies to regard governmental subsidies as mere gratuities or charitable donations, and often a claimant is met with the ruling that he has "no standing to sue". Yet in our modern economy, subsidies are of vital importance to large segments of the population. Mr. Eisenberg's article gives primary emphasis to the possibility of expanding the availability of judicial review in subsidy cases.**

■ Suppose your client, a private power company, is about to be put out of business by a new government financed cut rate competitor in the same area.[1] Or suppose your client, a shipbuilder or air carrier, has just been denied a promised government grant without which it cannot continue to operate.[2] Or suppose your client, a farmer, has been refused by the government parity prices for his products despite his compliance with all the costly restrictions of the price support program.[3] Or suppose your client, a veteran, has been denied GI benefits which he must have to complete his education.[4] And suppose, further, that in all these cases you believe the Government's action is unauthorized and in fact is contrary to such laws as are applicable. Certainly you would regard your client's situation as serious, and you even might be forgiven if you shared some of his indignation. But what would be your chances of securing judicial relief for him?

It is clear that you will not get very far in court unless you can establish your client's standing to sue. The initial problem of establishing a justiciable status apparently has deterred many lawsuits, it still being the general notion that subsidies are mere gratuities or charitable donations creating no enforceable rights in the intended beneficiaries.[5] Since just complaints may not be heard unless the plaintiff's standing is established, it may be worthwhile to consider here this threshold challenge to justiciability.

The typical subsidy program vests in administrative officials power to influence the welfare of substantial segments of our national economy. The magnitude of these programs[6] makes it imperative that there be adequate means for invoking judicial safeguards in their administration. Discussion of the problems in this area may help overcome some of the jurisdictional obstacles to securing more complete justice in this area of government activity.

Justiciability of Complaints... *Administrative Procedure Act*

The starting point for discussion of the justiciability of complaints about any federal agency action should be the Administrative Procedure Act.[7] The judicial review provisions of the Act are contained in Section 10.[8] With respect to "standing" this section provides that except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion:

> Any person suffering legal wrong

1. *Cf. Alabama Power Co.* v. *Ickes*, 302 U.S. 464 (1938), discussed *infra* at 719.

2. *Cf. American President Lines* v. *Federal Maritime Board*, 112 F. Supp. 346 (D.C. 1953), discussed *infra* at 720.

3. *Cf. Ayock-Lindsey Corp.* v. *United States*, 171 F. 2d 518 (C.A. 5 1948), discussed *infra* at 721.

4. *Cf. Miller* v. *United States*, 124 F. Supp. 203, 23 L.W. 2162 (W.Mo. 1954), discussed *infra* at 774.

5. See Schwartz, FRENCH ADMINISTRATIVE LAW AND THE COMMON LAW WORLD 157-158 (1954); Smith, *Public Assistance As a Social Obligation*, 63 HARV. L. REV. 266, 268-269 (1949).

6. The scope of the Federal Government's subsidy operations is indicated by the following table which appears in *Government Subsidy Historical Review*, Committee Print of Committee on Agriculture, 83d Cong., 2d Sess., 2 (1954): [In million dollars]

Fiscal year	Agriculture	Business	Labor	Veterans	General aids
1949 ...	341	773	175	5,549	1,091
1950 ...	601	789	228	5,583	1,264
1951 ...	905	809	197	4,515	1,327
1952 ...	463	1,041	200	4,710	1,364
1953 ...	305	934	215	4,178	1,506
1954 (estimated)	609	918	204	4,057	1,672
1955 (estimated)	549	609	216	4,095	1,656
Total	3,773	5,873	1,435	32,687	9,880

Contrary to a widely held opinion that government subsidies are a recent innovation, this report states: "The subsidy is the oldest economic principle written in the laws of the Unied States. It has been used from time to time since the inception of this Government to influence the direction of economic development and to moderate the impact of the normal workings of supply and demand. The principle has been employed to promote science, the arts, research, and for other Government aims and purposes." Id. at 1.

7. 5 U.S.C. §§1001-1011 (1952).

8. 5 U.S.C. §1009 (1952).

because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

Apart from the introductory exceptions,[9] two problems arise under this section pertinent to our subject, namely, whether agency action granting or denying a subsidy (1) can cause any person to "suffer a legal wrong" or (2) can "adversely affect or aggrieve" any person "within the meaning of any relevant statute".

(1) *Legal Wrong.* The "legal wrong" concept as a condition for standing to question government action is illustrated by *Alabama Power Co.* v. *Ickes,* 302 U.S. 464 (1938). In that case a private electric power company operating in Alabama sued to enjoin the execution of allegedly unconstitutional and illegal "loan-and-grant agreements" made with several Alabama municipalities under the public works provisions of the National Industrial Recovery Act. These agreements obligated the Federal Emergency Administrator of Public Works to make loans and grants to the municipalities to enable them to construct municipal electrical distribution systems which would then be operated in competition with the plaintiff. The Supreme Court, without determining the validity of the agreements, affirmed the decrees of the lower courts dismissing the suit on the ground that the power company was without standing to challenge the administrator's acts.

The decision of the Supreme Court was unanimous.[10] Justice Sutherland in his opinion for the Court explained that the "courts have no power to consider in isolation and annul an act of Congress on the ground that it is unconstitutional; but may consider that question 'only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such act.'"[11] The opinion emphasized that the term "direct injury" in a legal sense is limited to such "wrongs" as result in the "violation of a legal right". In this case, the Court concluded that even if the business of the power company is curtailed or destroyed by the operations of the municipality, "it will be by lawful competition from which no legal wrong results".

The *Alabama Power* case established that a person who is a competitor of a party receiving a loan or grant from the government does not for that reason alone have standing to challenge the legality of such action in the courts. It is premised on the view that injury to a legally protected right is the "touchstone to justiciability". *Anti-Facist Committee* v. *McGrath,* 341 U.S. 123, 140 (1951). In other cases, the Supreme Court has said that standing to complain of an injury by the government must rest upon a "legal right, —one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege", *Tennessee Power Co.* v. *Tennessee Valley Authority,* 306 U.S. 118, 137-138 (1939), and this right must be a "particular right [of the plaintiff] . . . as distinguished from the public's interest in the administration of law." *Perkins* v. *Lukens Steel Co.,* 310 U.S. 113, 125 (1940).

(2) *Adverse Effect.* Two years after the *Alabama Power* case the Supreme Court made it clear in another unanimous decision,[12] *Federal Communications Commission* v. *Sanders Radio Station,* 309 U.S. 470 (1940), that these judicial limitations on standing could be substantially enlarged by Congress. The statute involved in the *Sanders* case[13] allowed an appeal to the courts "by any . . . person aggrieved or whose interests are adversely affected by any order of the [Federal Communications] Commission. . . ." The Court held that this provision conferred standing to sue upon any competitor suffering "economic injury" from the challenged agency action. Without referring to the *Alabama Power* case, Justice Roberts, in his opinion for the Court, simply declared: "It is within the power of Congress to confer such standing to prosecute an appeal."

On the merits in the *Sanders* case, the Supreme Court held that economic injury to an existing station is not a separate and independent element to be taken into consideration by the Federal Communications Commission in determining whether to grant a license. This emphasizes the difference between the jurisdictional and substantive issues in cases under similar statutes, competitive status being sufficient to invoke the jurisdiction of the Court, although it may be irrelevant to a disposition of the merits. It emphasizes also the marked difference between the "legal wrong" and "adversely affected" tests, since if increased competition is irrelevant to the validity of a government grant, it can hardly be the predicate of a "legal wrong" to a competitor under the *Alabama* case rationale.

Section 10(a) of the Administrative Procedure Act clearly incorporates both the judicial "legal wrong" and the legislative "adversely affected" tests for standing. On its face, the "adversely affected" status is sufficient only where recognized as such under another applicable enactment as was the situation in the *Sanders* case.[14] This follows from the statement of this provision in Section 10(a) in terms of the "meaning of any relevant statute", indicating that without such an enactment, the provision has no independent significance under the Administra-

9. The questions of whether particular subsidy statutes "preclude review" or commit action to "agency discretion" are not discussed in this article except as they are related to the specific problem of "standing." An analysis of these and other related problems under the judicial review provisions of the Administrative Procedure Act is contained in Davis, *Nonreviewable Administrative Action,* 96 U.PA. L. REV. 749 (1948), and Davis, *Unreviewable Administrative Action,* 15 F.R.D. 411, 433 (1954).

10. Mr. Justice Black, the only member of the present Court who sat in this case, concurred only in the result.

11. Quoting from *Massachusetts* v. *Mellon,* 262 U.S. 447, 486 (1923).

12. By this time, four members of the present Court already were serving, namely: Mr. Justices Black, Reed, Frankfurter and Douglas.

13. See 47 U.S.C. § 402(b) (1952).

14. See also, *Associated Industries* v. *Ickes,* 134 F. 2d 694, 701 (2d Cir. 1943), *vacated on other grounds,* 320 U.S. 707 (1943); *Anti-Fascist Committee* v. *McGrath,* 341 U.S. 123, 151 (1951) (Frankfurter, J., concurring), and Attorney General's MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 96 (1947).

tive Procedure Act.[15]

Such an interpretation of the "adversely affected" provision of Section 10(a) also may be constitutionally necessary. Under Article III, § 2 of the Constitution, the federal courts may exercise jurisdiction only over actual "cases and controversies".[16] But, as already indicated,[17] a private citizen's suit challenging governmental action will not present a "justiciable controversy" over which the courts have jurisdiction unless that action has caused a "legal wrong" to the particular plaintiff. Obviously, then, a mere "adverse effect" would be constitutionally insufficient as a basis for standing under these precedents.[18]

The *Sanders* case, which upholds standing based on "adverse effect" can be reconciled with these precedents only by giving major emphasis to the language in that opinion recognizing Congress' authority to confer such standing by special statute. This point is thoroughly considered in *Associated Industries* v. *Ickes*.[19] In that case a statutory provision allowing a "person aggrieved" to seek review was upheld against the contention that it conferred jurisdiction on the courts without the requisite case or controversy. Rejecting this argument, Judge Frank, writing for the Court, explained:

> While Congress can constitutionally authorize no one, in the absence of an actual justiciable controversy, to bring a suit for judicial determination either of the constitutionality of a statute or the scope of powers conferred by a statute upon government officers, it can constitutionally authorize one of its own officials, such as the Attorney General, to bring a proceeding to prevent another official from acting in violation of his statutory powers; for then an actual controversy exists, and the Attorney General can properly be vested with authority, in such a controversy, to vindicate the interest of the public or the government. Instead of designating the Attorney General, or some other public officer, to bring such proceedings, Congress can constitutionally enact a statute conferring on any non-official person, or on a designated group of non-official persons, authority to bring a suit to prevent action by an officer in violation of his statutory powers; for then, in like manner, there is an actual controversy, and there is nothing constitutionally prohibiting Congress from empowering any person, official or not, to institute a proceeding involving such a controversy, even if the sole purpose is to vindicate the public interest. Such persons, so authorized, are, so to speak, private Attorneys General.

This apparent limitation of the "adversely affected" test to situations in which expressly authorized by some other relevant statute appears to have been largely disregarded in a recent district court subsidy case, *American President Lines* v. *Federal Maritime Board*, 112 F. Supp. 346 (D.D.C. 1953). In that case suit was brought by a steamship company for a declaratory judgment and an injunction to set aside subsidy grants made by the defendant Board to two of the plaintiff's competitors. On the jurisdictional issue, District Judge Holtzoff held that while the plaintiff had not suffered any "legal wrong" because of the subsidy grant to its competitors, it had standing to sue as a party "adversely affected or aggrieved" by the Board's action. In reaching this conclusion, Judge Holtzoff expressly relies on the *Sanders* case. Observing that the "phraseology of the pertinent provisions of the Administrative Procedure Act and of the Federal Communications Act are practically identical", he concludes: "If a competitor who fears adverse economic effects has a right to challenge the legality of official action under one of the Acts, the conclusion is inescapable that he may do so under the other Act."

The difficulty with Judge Holtzoff's analysis is that the Maritime Act, 46 U.S.C. § 1171 *et seq.* (1952), under which the Federal Maritime Board made the challenged grants, contains no express provision authorizing appeals to the courts from such action by persons "adversely affected" or "adversely aggrieved". Hence, unlike the situation in the *Sanders* case, the "relevant statute" here does not accord judicial standing to this category of persons. Therefore, unless the plaintiff suffered a "legal wrong" (and Judge Holtzoff held it had not under the rationale of the *Alabama Power* case) it would appear that it was without standing to challenge the Board's grant.

Milton Eisenberg is presently an Assistant United States District Attorney. He received his A. B. from Cornell in 1948 and his LL.B. from the Cornell Law School in 1950. Before his current appointment, he was law clerk to Judge John A. Danaher of the Court of Appeals for the District of Columbia Circuit. He also has served as an attorney in the enforcement branch of the National Labor Relations Board and with other federal agencies.

Judge Holtzoff's result ignores the "within the meaning of any relevant statute" limitation of the "adversely affected or aggrieved" test of standing. The effect of this decision is to read into this provision of the Administrative Procedure Act the *Sanders* test for standing regardless of whether Congress has expressly so provided in a "relevant statute". This conclusion apparently is based on Judge Holtzoff's view that the "Administrative Procedure Act is no

15. Statutes such as the Federal Communications Act which expressly authorize "adversely affected" parties to petition for review of the agency's action usually require that such petitions be filed in a court of appeals for the appropriate circuit. However, where the applicable statute is silent in this regard and jurisdiction is predicated on the Administrative Procedure Act, the action must be commenced in the district court. See *City of Dallas, Texas* v. *Rentzel*, 172 2d 122 (5th Cir. 1949), *cert. denied*, 338 U.S. 858 (1949).

16. *Aetna Life Ins. Co.* v. *Haworth*, 200 U.S. 227, 239 (1937).

17. See cases cited in text, *supra*, at 719, and *L. Singer & Sons* v. *Union Pacific R. Co.*, 311 U.S. 295, 304 (1940).

18. See *Associated Industries* v. *Ickes*, *supra*, note 14, 134 F. 2d at 704, and S. Rep. 752, 79th Cong., 1st Sess. 26 (1945).

19. Note 14, *supra*.

mere codification of pre-existing law". As he explains in his opinion: "If that [codification] were all that was accomplished by the enactment of this far-reaching statute, the prodigious labor that had been put into it, would have gone for naught. Contemporary discussion and debate clearly demonstrate that one of the main objectives of the Administrative Procedure Act was to extend the right of judicial review. One of its purposes was to enlarge the authority of the courts to check illegal and arbitrary administrative action. The courts stand between the citizen and administrative officers. The statute created no new remedies but contemplated the use of established types of proceedings to achieve its ends. On the other hand, it broadened the scope of judicial review and it enlarged the class of persons who were given standing to invoke the judicial process. The doctrine of *Alabama Power Co.* v. *Ickes, supra,* is not applicable to proceedings under the Administrative Procedure Act."

However desirable would be liberalization of the requirements for standing, it is doubtful that the rationale of the *American President* decision will be accepted generally. Its effect would be to render superfluous the "legal wrong" basis for standing, a result which finds little favor in the canons of statutory construction. Particularly must this be true here in view of the constitutional problems discussed and the express language in Section 10 (a) limiting the "adversely affected" test to situations in which it is recognized as a basis of standing under "other relevant statutes."

In Subsidy Cases . . . *The Privilege-Right Test*

Opportunity for considerable if not quite as extensive liberalization of the standing requirements in subsidy cases does exist, however, under the legal-wrong standard.

The determination of whether a grant or denial of a subsidy will be held to constitute a "legal wrong" to any person appears largely to depend upon whether such subsidies are characterized as rights in law or as "bounties"—"payments as of grace and not of right".[20] As the Supreme Court said in an early case: "A claim having no foundation in law, but depending entirely on the generosity of the government, constitutes no basis for the action of any legal principle . . . . [I]f the government from motives of public policy, or any other considerations, shall think proper, under such circumstances, to make a grant of money to the heirs of the claimant, they receive it as a gift or pure donation. A donation made, it is true, in reference to some meritorious act of their ancestor, but which did not constitute a matter of right against the government."[21]

A modified "privilege-right" view of subsidy justiciability has been taken in several more recent decisions. In *Ayock-Lindsey Corp.* v. *United States,* 171 F. 2d 518 (5th Cir. 1948), an action was brought by a naval stores operator to recover the difference between the subsidy payable under the Soil Conservation Act[22] to the plaintiff and its wholly owned corporate subsidiary as separate entities and the amount actually paid the plaintiff and its subsidiary considered as a single enterprise. The Court of Appeals, with one judge dissenting, held that the suit was justiciable. Rejecting the contention that the subsidy to naval stores producers was a mere gratuity creating "no enforceable claim or right of action against the Government", the majority of the court said: "In view of the numerous requirements for the naval stores operator to put himself in position to receive the payments, we regard the subsidies not as gratuities but as compensatory in nature. . . ." The court concluded that there was an "implied contract" on the part of the government to pay the subsidies on which a suit could be maintained. As the opinion explains: "When . . . the Secretary of Agriculture published bulletins and promulgated rules providing for the payment of subsidies to those naval stores producers who accepted the offer by voluntarily coming under, and complying with, the Act, there were revealed the traditional essentials of a contract, namely, an offer and an acceptance, to the extent that we would hesitate to hold that there was not at least an implied contract to pay subsidies, in some amount, and that a claim thereunder would also be founded upon a regulation of an executive department."[23]

The majority in *Ayock* relied in part on *Illinois Packing Co.* v. *Snyder,* 151 F. 2d 337 (Emer. App. 1945). Jurisdiction in that case ultimately was predicated on express language in the Emergency Price Control Act of 1942, and hence it probably is not directly in point. However, the issue involved raised the "privilege-right" problem and the opinion of the court sheds some light on this question. Briefly, the Government contended that the regulation at issue provided for "meat subsidies" in the nature of a bounty or gratuity from the government and accordingly, that the plaintiff could not legally object to its exclusion therefrom. Rejecting this phase of the Government's argument, the court said that "it is hardly accurate to describe the meat subsidies as a gratuity or bounty" and concluded that the subsidy regulation was "one of the mechanisms of the price control program".[24] Since the plaintiff

(Continued on page 774)

20. *Blagge* v. *Balch,* 162 U.S. 439 (1895). See also *Work* v. *United States,* 267 U.S. 175 (1925); and *Slocumb* v. *Gray,* 86 U.S. App. D.C. 5, 179 F. 2d 31 (D.C. Cir. 1949) ("Veterans' benefits are mere gratuities and 'the grant of them creates no vested right.' ")

21. *Emerson* v. *Hall,* 13 Pet. 409, 413 (U.S. 1839).

22. 16 U.S.C. §590 *et seq.* (1952).

23. *Contra: Moore* v. *United States,* 45 F. Supp. 656 (S.D. Iowa 1942). In the Moore case suit was brought to compel the Secretary of Agriculture to pay soil conservation benefits which allegedly were being withheld arbitrarily and without legal justification. The court held that the claim could not based upon an express or implied contract with the United States, and that it therefore was without jurisdiction. The decision is questionable in view of the numerous conditions exacted by the government in exchange for its promise to pay conservation benefits. See 16 U.S. C. §§ 590a-590h, 590i, 590j-590q (1952).

24. This subject is fully discussed in *Riverview Packing Co.* v. *Reconstruction Finance Corporation,* 207 F. 2d 361 (C.A. 3d 1953) where the court likewise concludes that "The meat subsidy payments were not mere gratuities or bounties but were articulated with the price control program and operated as compensatory in nature so as to validate a lower

Seventy-eighth Annual Meeting Offers Entertaiment Program of Universal Appeal

by C. Brewster Rhoads · *Chancellor, Philadelphia Bar Association*

■ The May issue of the JOURNAL announced tentative plans for Philadelphia's entertainment of the members and distinguished guests of the American Bar Association in August. That program is now completed.

The historic setting of colonial Philadelphia, the presence of the President of the United States, the Vice President and the Chief Justice as our guests, the commemoration of the two-hundredth anniversary of the birth of John Marshall, and the serious character of many of the issues which will highlight the debates in the House of Delegates, will assure a stimulating and memorable meeting.

The Philadelphia Bar Association, as official host, in fine and intimate co-operation with the Pennsylvania and Delaware Bar Associations, does not seek to detract from the scheduled activities or the heavy duties of the delegates, officers and Board of Governors; but, on the assumption that our guests, irrespective of age or other disabilities, might seek respite from such serious deliberations, the Committee on Arrangements has scheduled a varied recreational program, calculated to appeal to the cultural tastes and normal appetites of those who may wish to leaven their activities by good homespun recreation. With this objective before us, and in the hope that we might keep our good friends as far as possible from the terror of Philadelphia hotel rooms in mid-August, we have sought to develop an entertainment program with universal appeal. We hope that when our last guests leave Philadelphia they will carry home memories of gracious hospitality in the tradition of our city which is privileged to welcome the 78th Annual Meeting of the American Bar Association at its opening session on August 22.

The daily activities scheduled for the entertainment of our guests will no doubt have been published long before this message is read. A few words highlighting several of these events and activities may afford an opportunity for choice of recreation.

On Sunday evening, August 21, our guests will be privileged to visit the world-famous Longwood Gardens illuminated by the magnificent colored fountains patterned after the gardens of Versailles. Through the courtesy of the Delaware Bar Association the Savoy Opera Company will present a performance of *Trial by Jury* in an outdoor theater located in the Gardens. Transportation will be provided for all of our guests, and we are confident that those being entertained by their personal friends in the suburban countryside of Philadelphia will be able to journey to Longwood Gardens by private conveyance.

The program includes a concert by the National Broadcasting Company's Symphony Orchestra of the Air in Philadelphia's air-conditioned Convention Hall on the evening of August 22, with special guest stars in attendance, and of course reserved seats for the members of the American Bar Association. As Convention Hall accomodates upwards of 13,000 persons, we intend to implement the public relations program of the Association by making this splendid concert available without charge to members of the public who wish to share with us this outstanding musical contribution.

Among the many features of particular interest to our ladies are a tea and fashion show through the courtesy of John Wanamaker, Philadelphia, in its comfortable air-conditioned tea-room. The distaff group of our Arrangements Committee insists that the contemplated tour of the old houses of Colonial Philadelphia on Thursday, August 25, which will take a group of our guests through historic houses and gardens of Philadelphia, Fairmount Park and Germantown, concluding with luncheon tendered by the Philadelphia Bar Association at the Philadelphia Cricket and Germantown Cricket Clubs, will be an outstanding event of great interest to those interested in gardens and historic homes.

A unique feature of our entertainment will be a "zoo party" on the evening of Tuesday, August 23, in the first zoological garden established in America on the estate of John Penn, grandson of the founder of Pennsylvania. In addition to watching the feeding of the animals, and wondering what they may be thinking of human beings, appropriate refreshments suitable to all tastes will be served. This event is sponsored by the Philadelphia Bar Association in collaboration with and through the courtesy of the Zoological Society of Philadelphia.

Those interested in the economic

situation of Philadelphia in relation to the great and fast developing Delaware Valley, U.S.A., will be afforded an opportunity to visit the Fairless Plant of the U. S. Steel Corporation on Tuesday, August 23. The *SS. State of Pennsylvania*, with facilities to accommodate upwards of 3000 persons, will leave the Chestnut Street Wharf in mid-morning and return in time for evening engagements. Box lunches will be served, and those who do not wish to take the tour of the Fairless Plant will be permitted to remain on board and journey as far north as Trenton on the Delaware. This trip will certainly be of great interest to those who wish to observe the industrial development of Philadelphia's waterfront, pass close by the Penn Treaty site, and enjoy the beauties of some of the old Colonial homes along the Delaware River.

We are delighted to announce that the reception in honor of Loyd Wright, President of the American Bar Association, on the evening of August 24, will be sponsored by the Pennsylvania Bar Association whose President, Paul A. Mueller, has made elaborate arrangements through an energetic committee for the reception in the Art Museum, a truly magnificent building at the head of Philadelphia's Parkway. Here, prior to the formal reception at ten o'clock, our guests will be afforded an opportunity to roam through the beautiful galleries of the Museum, examine at leisure world-famous works of art, and return to the reception which will be held in the room housing the collection of paintings formerly owned by the late John G. Johnson, one of the foremost lawyers of the American Bar. Music and dancing will follow the reception which we hope will not only be a fine tribute to Loyd Wright, but will afford an opportunity for companionship and enjoyment which an occasion of this kind should produce.

Much has already been said concerning the plans for Wednesday, August 24, when the President of the United States will be the guest of the American Bar Association and deliver an address at Independence Hall followed by an appropriate response from Chief Justice Warren. Preceding his address the President will proceed from his headquarters in Philadelphia to Independence Mall, escorted by Philadelphia's First City Troop in Colonial uniform, and accompanied by the United States Marine Corps' Drum and Bugle Corps. On the Mall just north of Independence Hall, a luncheon will be tendered to the American Bar Association and its distinguished guests by the Insurance Company of North America, founded in Philadelphia in 1792.

I should like to add a note of interest to the teen-agers who may be joining us in August. A special committee has been formed to afford appropriate entertainment for those youngsters who may wish to slip away from the city for a day's recreation along the Jersey Coast or who might wish to enjoy tennis, golf, swimming or other recreational activities throughout the countryside of Philadelphia. We hope that this program may induce many of our friends to bring to Philadelphia their children, with the assurance that every effort will be made to give them a fine time during their brief stay with us.

For those who may be especially concerned with cultural and historic Philadelphia, tours to points of interest are being arranged at convenient times. A committee under the leadership of George P. Orr and William Clarke Mason has arranged a group of unique and rare exhibits which will be made available through the courtesy and co-operation of the University of Pennsylvania Museum, the Pennsylvania Academy of the Fine Arts, the American Philosophical Society, the Philadelphia Free Library, the Atwater Kent Museum and the Historical Society of Pennsylvania. These interesting exhibits include Benjamin Franklin's will, data on his electrical experiments, a manuscript draft of the Declaration of Independence written entirely in the hand of Thomas Jefferson, historical wills, and documents from the Register of Wills, the first draft of the Constitution of the United States, Andrew Hamilton's "freedom box" presented to him by the City of New York upon the winning of the Zenger case and many other choice articles of literary and historical interest. These will be included in a special and informative guidebook for distribution to the members of the American Bar Association.

It would be impossible in the short space allotted me to give due credit to the scores of men and women of the Pennsylvania and the Philadelphia Bar Association who have contributed their time, thought and energy to planning a well-rounded entertainment program for our guests. Our Advisory Chairmen include our beloved Senator George Wharton Pepper, Joseph W. Henderson, former President of the American Bar Association, Chief Justice Horace Stern of the Supreme Court of Pennsylvania, William A. Schnader, former Attorney General of Pennsylvania, and William Clarke Mason and Robert T. McCracken, past Chancellors of the Philadelphia Bar Association.

We are deeply indebted to J. Wesley McWilliams, Chairman of our Entertainment Committee, to Mrs. John W. Lord, Jr., Chairman of the Ladies Activities Committee, to David F. Maxwell, Executive Vice Chairman of our Committee on Arrangements, to Walter E. Alessandroni in charge of the Headquarters Committee, and to Bernard G. Segal who has headed up so effectively our important Finance Committee. My sincere and heartfelt thanks are tendered to every member of our fine group of committees and to their chairmen.

We look forward with genuine anticipation to the advent in Philadelphia of our friends of the American Bar Association. They will be welcome, and we hope they will enjoy with real satisfaction every minute of their brief stay in this historic city.

AMERICAN BAR ASSOCIATION

Journal

TAPPAN GREGORY, *Editor-in-Chief*.....Chicago, Ill.
LOUISE CHILD, *Assistant to the Editor-in-Chief*....Chicago, Ill.

BOARD OF EDITORS

ALFRED J. SCHWEPPE.....Seattle, Wash.
GEORGE ROSSMAN.....Salem, Ore.
RICHARD BENTLEY.....Chicago, Ill.
EUGENE C. GERHART.....Binghamton, N. Y.
ROY E. WILLY.....Sioux Falls, S. Dak.
E. J. DIMOCK.....New York, N. Y.
DAVID F. MAXWELL.....Philadelphia, Pa.
LOYD WRIGHT, *President of the Association*.....Los Angeles, Calif.
JOHN D. RANDALL, *Chairman, House of Delegates*.....Cedar Rapids, Ia.
HAROLD H. BREDELL, *Treasurer of the Association*.....Indianapolis, Ind.

General Subscription price for nonmembers, $5 a year.
Students in Law Schools, $3 a year.
Price for a single copy, 75 cents; to members, 50 cents.
Members of the American Law Student Association, $1.50 a year.

EDITORIAL OFFICES

1155 East Sixtieth Street.....Chicago 37, Ill.

Signed Articles
As one object of the *American Bar Association Journal* is to afford a forum for the free expression of members of the Bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of the *Journal* assume no responsibility for the opinions or facts in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

■ *John Marshall: Expounder of the Constitution*

Philadelphia is the fitting site for the tribute from the American Bar to Chief Justice John Marshall. For it was here on July 6, 1835, that he died in his eightieth year. Philadelphia—city where American independence was proclaimed to the world! Philadelphia—where the American Constitution was born! Here in Independence Hall we can see again that symbol of American freedom, the Liberty Bell, which ended its labors when it cracked tolling the funeral knell of John Marshall. Nineteen hundred fifty-five marks the two hundredth anniversary of the birth of this illustrious American lawgiver.

Born on September 24, 1755, Marshall was destined to join that contemporary company of immortal Virginians to whom America can never fully repay its debt. His formal education in the law was limited to six months' study at William and Mary College under the rare tutelage of George Wythe. Although he lacked a formal education, his native genius and his ability to work could put to shame many a college graduate of his day—and our own. During the Revolution he took up arms against Britain, fought at Monmouth and suffered the privations of Valley Forge. Returning to Richmond he soon developed the largest law practice in that city and became the acknowledged head of the eminent Virginia Bar of his day. He was a militant advocate in striving for the adoption of the new Constitution. He was a strong Federalist who served his country as envoy to France and, at Washington's urging, as a Congressman. President Adams was responsible for appointing him, first Secretary of State, and finally in 1801 to the post where he gained legal immortality, Chief Justice of the United States.

As Chief Justice, John Marshall wrote himself indelibly into American constitutional law. As our present esteemed Chief Justice points out in the pages of this issue of our JOURNAL, Marshall's friend and judicial colleague, Joseph Story, labelled him "the expounder of the Constitution". And so he was! Marshall was the true chief of his Court. Over the bitter opposition of Thomas Jefferson, he established the doctrine of judicial review in *Marbury* v. *Madison*. "Merely an *obiter* dissertation of the Chief Justice", Jefferson called it—but Marshall's landmark still stands! The unity he brought to the burgeoning nation is best exemplified by the number of unanimous decisions of the Court during his regime. Jefferson condemned this practice of "caucusing opinions" but it gave new dignity and power to the Court and the Constitution.

John Marshall's place in history is secure. Schoolboys and law students, lawyers and judges still fondly repeat his ringing phrases interpreting our revered Constitution: "A government of laws, and not of men"; "A constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it"; "the power to tax involves the power to destroy"; "it is a constitution we are expounding"—a constitution "to endure for ages". Marshall warned Americans that "we shall remain free if we do not deserve to be slaves". Truly it was Marshall's pen which wrote the rubrics of our constitutional law. Yet the eyes of this simple, modest lawyer and judge were filled with tears as he listened to the mighty Webster's eloquent, emotional peroration on behalf of Dartmouth College.

John Marshall's image is the only American lawgiver's which adorns the frieze of our Supreme Court building. This is a fitting tribute to his unique place in Anglo-American law. For who will provide the answer to Justice Story's questions in his famous eulogy of Chief Justice Marshall delivered a few months after his death:

> When shall we look upon his like again? When may we again hope to see so much moderation with so much firmness; so much sagacity with so much modesty; so much learning with so much purity; so much wisdom with so much gentleness; so much splendor of talent with so much benevolence; so much of everything to love and admire, with nothing, absolutely nothing to regret?

Korean Law Center

Justice is not justice by our standards unless it be under law; and our liberties live only as they are maintained under the law. The law fashioned in the framework of our Government is not the law of the tyrant or the dictator; it is basic to that Government instituted to secure inalienable rights, deriving its "just powers from the consent of the governed". They, the people themselves, are the authors of our laws.

Under this philosophy of law and government our nation has grown great; our citizens have known comfort and well-being and good living. For this philosophy we have always been ready and willing to fight, knowing well that otherwise they are lost.

As we have prospered, we have come to realize great sympathy for those less fortunate and to entertain an earnest desire to help them follow our example if they are responsive and the prospects of resulting usefulness of effort are reasonable.

Korea has been a nation for 4300 years. Yet even today it knows little of our law and our system for the administration of justice. Their judges and lawyers were educated under Japanese law. But the Koreans are proud of their new constitution and eager to learn from us something of Anglo-American constitutional law. To this end, President Rhee requested our State Department to send two United States lawyers to conduct an institute on this subject in Korea. The response was favorable and former President Robert G. Storey and Dr. Jerome Hall, of Indiana University Law School, were designated. What they found, what they did and what they planned made a gratifying story of achievement and progress as told in the pages of our July issue by Mr. Storey.

Reading on the Run

Lawyers today are overwhelmed by a deluge of reading matter. Court decisions, office correspondence, law reviews, legal magazines and information services load our desks and briefcases with material we must at least examine. The niagara of words which is poured out daily in the form of newspapers, news magazines and books is more than any single mind can possibly absorb. The wise adage to "read only the best" long ago yielded to a wiser one, "Read only the best of the best". Even within that restricted limit the lawyer today must develop the art of rapid reading.

Is there a formula for rapid reading so "that he may run that readeth"? Certainly there are books on the technique of how to read better and faster. There is probably no absolute rule of thumb. Rubbish is still rubbish after you have read it. It has always been foolish for a professional man to waste time on trash, even if it is in print. Serious works like the Supreme Court Reports may well be read at turtle pace—slow but sure. Bacon observed that some books are to be tasted, some swallowed and a few chewed and digested. Sage advice! A lawyer needs discriminating judgment in making the selection of his literary intake. He therefore welcomes headnotes, book reviews and the counsel of literary friends whose judgment he respects.

The technique of rapid reading can fortunately be developed. A good book reviewer will cover one hundred pages an hour. A daily columnist for a leading New York newspaper says, "We gobble three or four hundred books a year." A lawyer need not match that voracious appetite. Nevertheless, it helps him to be aware of the possibilities and advantages of rapid reading. The faster your habitual reading rate, the keener your comprehension of what you read. An adult who races through a page of print at about six hundred words per minute gets far more out of his reading than the slowpoke who dawdles along at one hundred fifty words per minute. (This is a conclusion reached in numerous reading surveys.)

A rapid reader develops the courage of exclusion. In earlier days the ability to read put power in the hands of the ruling classes. With words they could frighten and subdue the strong and establish themselves as a priestly class. The mystery of written words on paper enabled them to frighten and impress the mass of ignorant men. A vestige of this superstitious approach to the printed word remains in our common compulsion to finish each book we start. Commenting on advice to a pupil to do just that, Dr. Samuel Johnson said: "This is surely a strange advice; you may as well resolve that whatever men you happen to get acquainted with, you are to keep to them for life. A book may be good for nothing; or there may be only one thing in it worth knowing: are we to read it all through?" We agree with the great doctor. After all, you don't have to eat all of an egg to find out that it is bad.

Internal Revenue:

Depreciation Under the New Code

by Lester M. Ponder • *of the Indiana Bar (Indianapolis)*

■ This is another in a monthly series of articles on the Internal Revenue Code. The articles are written by committee or subcommittee chairmen of the Section of Taxation and are edited by John W. Ervin, Chairman of the Section's Committee on Publications, as a service of the Section to help Association members understand the changes made by the new law. Several other articles are in preparation and will appear in later issues of the Journal.

■ The major changes effected by Section 167 of the Internal Revenue Code of 1954 relating to the deduction for depreciation involve certain methods for accelerated depreciation which were not previously available to taxpayers. These new accelerated provisions apply only to certain types of properties described in Sections 167 (c) (1) and (2), which generally exclude properties acquired prior to January 1, 1954.

The first of such methods is the "double declining balance" method which permits a taxpayer to deduct depreciation at double the rate used under the familiar straight-line method. Under Section 23 (l) of the Internal Revenue Code of 1939 the declining balance method was allowed by the Treasury Department under certain circumstances, but the rate was ordinarily limited to one and one-half times the rate used under the straight-line method. Further, the Treasury Department was not inclined to allow taxpayers to use the declining balance method even to this extent in many instances. Section 167 (b) (2) provides that with respect to the particular types of property enumerated therein, a taxpayer may choose the double declining balance method without obtaining the approval of the Treasury Department.

The use of this method applies a uniform rate of depreciation to the unrecovered basis of the particular asset. Since the basis is continually reduced by prior depreciation, the rate is, therefore, applied to a constantly declining basis, which explains the descriptive name given to this method. The salvage value is not deducted from the basis prior to applying the rate, since under this method there always remains an undepreciated balance which represents salvage value at the expiration of useful life. The rate to be used under this method cannot exceed twice the rate which would have been used had the deduction been computed under the straight-line method. If a taxpayer was using this method prior to December 31, 1953, he may continue to do so, but he may not increase the rate to the double figure under Section 167 (b) (2). It is clear that the choice of this method will result in much greater depreciation deductions during the early life of an asset as compared to one of the more conventional depreciation methods, such as the straight-line method.

"Sum of the Years-Digits" Method

The second new accelerated method of depreciation is known as the "sum of the years-digits" method. This method was added to the law by the Senate and was then accepted by the Conference Committee and included in the final draft of the Code as Section 167 (b) (3). Under this method the annual depreciation deduction is computed by applying a changing fraction to the taxpayer's cost of the property reduced by the estimated salvage value. The denominator of the fraction is the sum of the numbers representing the successive twelve-month periods in the estimated life of the property and the numerator of which is the number of twelve-month periods, including that for which the allowance is being computed, remaining in the estimated useful life of the property.

In view of the rather complicated nature of this method, an illustrative example from the Senate Finance Committee Report furnishes a clear explanation:

. . . A acquires new property in 1954 which costs $175, has an estimated useful life of 5 years and an estimated salvage of $25. The depreciation schedule for the asset will be as follows:

Year	Fraction of cost less salvage ($175 — 25 = 150)	Depreciation deduction	Total reserve	Adjusted basis
1	5/15	$50	$50	$125
2	4/15	40	90	85
3	3/15	30	120	55
4	2/15	20	140	35
5	1/15	10	150	25
Total .	....	$150	...	...

Alternative Methods

Section 167 (b) (4) provides that a taxpayer may adopt any other method consistently applied which will not, during the first two thirds of the useful life of the property, produce a larger depreciation reserve than would have been accumulated had the double declining balance method been adopted. This provision was added to the law in order not to restrict the use of the multiple rate straight-line method and any other method which because of a small salvage value may accumulate a greater reserve for depreciation in the latter years of an asset's life than would have been accumulated under the declining balance method. The Code also provides that all methods which have been allowed in the past will continue to be permitted, which would include such techniques as the annuity and the sinking fund methods.

Restrictions to New Property

As previously indicated, all of the foregoing new depreciation methods may be used only with respect to new property under Section 167 (c) (1) and (2). The Conference Committee restored the provision in the House Bill that only that portion of the basis of the property which is attributable to the construction, reconstruction or erection after December 31, 1953, is subject to the new depreciation methods provided in Section 167 (b) (2), (3) and (4). Further, the use of these new methods was restricted to property with a useful life of three or more years to prevent unreasonable accumulations of depreciation allowances for property having a relatively short life. As pointed out in the Senate Finance Committee Report, if the declining balance method was used for an asset with a two-year life, the use of a 50 per cent straight-line rate would result in a charge-off of 100 per cent in the first taxable year if there was no such limitation. If a portion of the property has been constructed, reconstructed or erected after December 31, 1953, the new methods will apply to such portions, but the provisions of Section 167 (a) are not to apply to the portions completed or put into use prior to January 1, 1954.

If property was completed prior to December 31, 1953, but the original use thereof was commenced with the taxpayer after that date, the new methods would be applicable. In other words, such property would qualify as being new in use, even though the property might not be actually new in production prior to January 1, 1954. This rule would apply to such items of property as machinery and equipment which were acquired by a taxpayer after December 31, 1953.

The Senate Finance Committee Report contains a clear example of the application of Section 167 (c) (2). "Thus if A acquires title to a machine from the manufacturer after December 31, 1953, and puts it into use for the first time thereafter", the use of one of the new, accelerated methods will be permitted. "However, if A buys a machine on January 2, 1954, from B, who had used the machine prior to December 31, 1953", the new, accelerated methods may not be used, "inasmuch as the original use of the machine does not commence with A". Further, if "A purchases a machine which had been used prior to December 31, 1953, from the X company which had in 1954 taken the machine as a trade-in and reconditioned it", the accelerated methods are unavailable "inasmuch as the original use of the machine had begun prior to A's acquisition thereof".

Lester M. Ponder practices in Indianapolis and is Visiting Associate Professor of Law at Indiana University School of Law. A graduate of the George Washington University Law School (J.D., 1938), he is a former assistant counsel to the appellate division of the Chicago and Indianapolis offices of the Internal Revenue Service.

Miscellaneous Provisions

No formal election is necessary in order to compute the depreciation deduction under the new methods provided in the 1954 Code. The taxpayer need only compute depreciation thereon for the first taxable year ending after December 31, 1953, in which property described in Section 167 (c) is acquired.

The Senate Finance Committee Report states that "In the case of item accounts, any reasonable method may be selected for each item of property but must be applied con-

sistently to that item. In the case of group, classified or composite accounts any reasonable method may be selected for each account and must be applied to that account consistently thereafter." The Senate Finance Committee Report also contains elaborate examples and computations showing the application of these principles to group or composite account situations.

Agreements Between Government and Taxpayer

Another major change in this area is contained in Section 167 (d) which provides that the Treasury Department and a taxpayer may enter into binding agreements which fix the useful life and the rate of depreciation on any specified piece of property. The statute provides that such an agreement "shall be binding on both the taxpayer and the Secretary in the absence of facts and circumstances not taken into consideration in the adoption of such agreement". The statute also provides that if one of the parties desires to change such an agreement, the burden of establishing the requisite facts and circumstances shall rest upon the party "initiating the modification". Further, any change which may be made in such an agreement is limited to prospective effect.

Section 167 (e) provides that if there is no agreement under subsection (d) to the contrary, a taxpayer may elect at any time to change from the double declining balance method to the straight-line method under appropriate Treasury Regulations without obtaining the advance approval of the Secretary or his delegate. This provision is of vital importance because after depreciation has been deducted for several years under the double declining balance method, it will often be advantageous for a taxpayer to shift to the straight-line method so that he will be able to deduct the entire basis for an asset during its useful life, since under the declining balance method there is always some remaining basis.

Section 167 (f) contains basis provisions for computing depreciation deductions which correspond to Section 114 (a) of the 1939 Code. Section 167 (g) provides for the computation of depreciation by life tenants and beneficiaries of trusts and estates. It corresponds to the second and third sentences of Section 23 (l) of the 1939 Code. Hence, no change is effected in these areas by the 1954 Code.

The present depreciation provisions represent an effort by the Congress to allow taxpayers to deduct the major portion of the total depreciation deduction in the earlier years of the useful life of new or newly-acquired property. Thus the new Code attempts to encourage replacement of old property by acquisition or construction of new assets. The new law also endeavors to introduce more flexibility into this area by its provisions governing the use of agreements fixing the useful life and rate of depreciation. The evaluation of the effectiveness of these statutory goals must await actual experience under administrative and judicial construction.

West Point Cadet Receives Association Award

■ Cadet Russell Parsons, the man standing first in law in the Class of 1955 at the United States Military Academy, received the American Bar Association's annual award at a retreat review of the entire Corps of Cadets on the Plain at West Point on June 6, 1955.

As in other years since its establishment in 1941, this award was one of a number presented in June to cadets outstanding in scholarship and leadership. And like the award of last year, two sets of books, Albert J. Beveridge's *Life of John Marshall* and Merlo J. Pusey's *Charles Evans Hughes,* were presented.

Representing the Association at the ceremonies this year was Lieutenant Colonel Joseph F. O'Connell, Jr., Judge Advocate General's Corps Reserve, of Boston, Massachusetts.

Born near Augusta, Kansas, in 1933, Cadet Parsons came directly from high school to the Military Academy upon his appointment by Congressman Edward H. Rees. An outstanding student, Cadet Parsons wore on his collar the "stars" of a distinguished cadet for three years, standing at the head of his class during his first-class year and ninth in the class of 470 members for the four-year period. A cadet lieutenant, he was also active as the Brigade Academic Officer, on the Debate Council and Forum and on the General Committee. He has chosen the Artillery as his branch of service.

A set of books is presented to Cadet Russell L. Parsons in the name of the American Bar Association by Lieutenant Colonel Joseph F. O'Connell, Jr.

A Time of Great Progress:

Our Relations With Latin America

by **Henry F. Holland** • ***Assistant Secretary of State for Inter-American Affairs***

▪ Addressing the Pacific Southwest Regional Meeting, held last April in Phoenix, Arizona, Mr. Holland told the assembled members of the Association of our Government's basic policies and hopes in our relationship with the twenty American republics south of our borders. He also showed why good will among the American nations is so important to all of us.

▪ Some rather important developments have occurred during the past two years in our relations with the American Republics. These can be expected to affect materially the course of our relationships with them for a number of years to come.

I should like to undertake a somewhat comprehensive review of these events, of our own policies in the areas affected and of our plans for the implementation of these policies. The real interest of the people of the United States in Latin America and the ever-increasing importance of our relationships with these neighboring countries make such a review timely.

Any policy in the field of foreign affairs is of little value unless the people affected by it can be reasonably certain of its stability. This stability permits governments and peoples to make long-term plans of the kind essential to any real accomplishment. For our policies to have such stability it is essential that they be based on an enlightened definition of national foreign policy goals and that the goals enjoy the broadest possible support of our people.

No government, of course, can guarantee that its policies will not change. We have gone, however, to great lengths to ensure that our foreign policies in the inter-American field are truly bipartisan and reflect the views of all agencies of our Government. We hope, therefore, that they will have maximum stability and receive the support of our people. It is their interests that must be our primary concern.

It seems to me that our people have a realistic understanding of the importance of the relationships between our country and the rest of the Americas. Those relationships embrace the cultural, political, military and economic fields. Their importance was eloquently stated by Vice President Nixon and by Dr. Milton Eisenhower after their recent tours in Latin America.

The inter-American policies of our Government may be stated very simply. In every field, they are based upon the fundamental convictions that we are an American family and that our economic relationship is essentially that of partners. Throughout the hemisphere we are striving to achieve the kind of relationship that should, we believe, normally exist among nations who trust and respect each other and who are at peace among themselves.

The cultural and spiritual ties between American states are the common foundation for our relations in other fields. Again and again we have seen close and loyal co-operation between nations who have few if any political or economic ties, but whose cultural bonds are strong and sincere. On the contrary, lasting and effective co-operation between nations without such bonds seems difficult if not impossible. Therefore, strong cultural ties between the American states are truly a key to that larger kinship, embracing the economic, political and military fields which we seek to preserve and strengthen. This deep conviction likewise underlies all the policies of our Government in this hemisphere.

For such ties to be strong it is not necessary that we all share the same culture and the same views. But it is necessary that we all understand and respect those two great cultures, Latin and Anglo-Saxon, which we pray will for all time enrich the lives of the peoples of America.

In this moral and cultural field, therefore, our policy will continue to be to support every practical measure that is logically designed to strengthen and extend in every American state genuine understanding and respect for every other. We

have no illusions that differences of opinion will not arise between us. Such differences exist between several American states today. Undoubtedly, they will continue to arise. But as understanding and respect deepen between any two or more American states, the differences between them will diminish in number and intensity.

I have said that policies are not worth much unless they are stable. You will agree, too, that they mean little until something affirmative is done to implement them.

Exchange of Visitors . . . *A Fine Road to Understanding*

What is the United States doing to strengthen understanding and respect? There is no finer road to understanding than through the exchange of visitors. With this in mind, the State Department's program for the exchange between the United States and Latin America of outstanding leaders and students has been substantially increased. We are also arranging that some of the funds deriving from the sale of surplus agricultural commodities to countries in this hemisphere be used to establish scholarships for study, research, teaching and lecturing in universities. The number of Latin American technicians and labor leaders invited to the United States under the Foreign Operations Administration has also been increased. This year it is expected that as many as 1500 Latin Americans may visit us under these two programs, as compared to 780 last year.

Another fine work in the cultural field is that of the State Department's assistance to American schools, and the bi-national cultural centers which have been established in many parts of Latin America by the United States Information Agency. Our contributions to these institutions are being increased and additional bi-national centers are being established. The United States Information Agency is continuing its program for distributing documentary films, books and other publications, and its book translation programs all intended to achieve a better understanding throughout Latin America of the people of the United States, our policies and our efforts to solve the economic and other problems which face us all.

It is fortunate that so many high officials of our own and the other American governments have been able to travel within the hemisphere. President Magloire of Haiti visited this country early this year, and more recently Vice President and Mrs. Nixon made a trip through the ten countries of Middle America. Our Secretaries of State, Treasury and Agriculture, the Attorney General and high congressional and military leaders in recent months visited Latin-American countries. Of similar importance was the Inter-American Investment Conference held in New Orleans in February. There several hundred businessmen and financiers of the United States and a similar number from Latin America met for practical discussions on investment possibilities in Latin America.

I had the honor to accompany Vice President Nixon on his recent visit to Mexico, Central America and the Caribbean Republics. Mr. Nixon spoke not only with chiefs of state and high officials; he made opportunities to talk with labor leaders, businessmen, teachers, laborers and the man in the street. He was able to appreciate the great reserve of genuine affection for the people of this country which exists in our neighbor republics. He, in turn, was able to show them how warmly and sincerely this affection is reciprocated. Visits such as his and that of Dr. Milton Eisenhower to South America in 1953 play an important role in the development of our relations with the rest of the Americas.

There is no need to emphasize the importance of our political relationships in the Americas. True, differences exist between some American states, but in the political field the policies of the American republics have attained a degree of advancement and effective implementation unequalled elsewhere in the world. The unity of the Americas in determined support of the peaceful settlement of political problems is unique. This unity of purpose has permitted us to develop a system of inter-American treaties and institutions which have often served as models for other international organizations. Their effectiveness has been demonstrated time and again in our own affairs within the American family.

No one denies that there are opportunities for self-improvement in the United States and in each of the twenty other American republics. Yet the demonstration that more than a score of nations, large and small, can fashion a hemisphere where there are no satellites and where for a quarter of a century the living standards of the people have risen steadily, has come to have an increasing influence in the conduct of international relationships throughout the free world. It is a measure of the importance of these inter-American ties to say that all this would cease to exist should we allow this remarkable political unity to be destroyed.

Our inter-American system is based essentially on the Organization of American States, or OAS. The permanent organ and general secretariat of the OAS is the Pan-American Union. The Charter of the OAS and the treaties which led to its adoption establish those principles of sovereign equality, non-intervention and mutual cooperation which have been adopted by the United Nations.

At the Tenth Inter-American Conference, held a year ago in Caracas, a new principle was added to this evolving American creed. Long ago we agreed to treat an attack on any American state as an attack on all. In Caracas, this principle was enlarged to meet the requirements of today's cold war. We there warned the leaders of international Communism that if they succeeded in dominating the political institutions of any Amercan state, all would assemble to decide upon measures to eliminate such a threat to the peace of the Americas.

Communism in Guatemala . . . *Thwarted by Prompt Action*

You recall what followed. International Cummunism did achieve domination of the political institutions of Guatemala. The American states agreed to meet in July of 1954 to consider the problem. Heartened by that determination the people of Guatemala rose and dispersed the little group of traitors who had tried to convert their government into another Communist satellite.

In January we saw another impressive demonstration of the Inter-American system in action. Acting with great rapidity, the Organization of American States took a series of steps which effectively removed a serious threat to the territory and sovereignty of the Republic of Costa Rica.

The common denominator running through our policies in the political field is our steadfast purpose to support all measures which make of the OAS an effective mechanism for preserving the peace of the Americas, the sovereignty and political integrity of our nations. We shall cooperate with our sister republics to assure that the Organization of American States confronts courageously, effectively and with unswerving moral purpose the problems which come before it. Only thus can it fulfill the trust which has been reposed in it by the peoples of our hemisphere.

In the military field our policies are based upon the conviction that so long as this hemisphere remains a joint homeland for all American states, the security of each is greatly fortified. Participation by our sister republics in a common program for the defense of the hemisphere enables the United States to shoulder on behalf of all military responsibilities elsewhere in the world which we could not otherwise assume.

The constantly improving co-ordination between our armed forces enables those of our sister republics who so elect not only to man their part of the inner defenses of our hemisphere, but also, as have Brazil, Mexico and Colombia in the past, to share our arms in other parts of the world should war break out anew.

Happily for the peoples of America, decades of constructive co-operation in the political and military fields have brought about mutually satisfactory solutions to our major problems in those fields. Today, the greatest problems facing the nations of this hemisphere lie in the field of economics. To state this differently, while not diminishing our constant interest in the preservation and development of personal freedoms and free democratic institutions, we can today devote greater energy than ever before to making the lives of our people more abundant.

Economic relations among the nations of the hemisphere are generally normal and progressive. In many areas of the world enormous obstacles will have to be overcome before nations can achieve the kind of economic relations which are accepted as a matter of course among the American republics.

Our United States' trade with Latin America is now about $3.5 billion in each direction each year. More than a fifth of all our exports goes to our sister republics—roughly the same amount that we sell to all of Europe and more than to Asia, Africa and Oceania combined. Our imports from them are greater than from Europe or the other continents. Our shipments to them represent more than 50 per cent of all their imports. On the other hand, Latin America's annual shipments to us represent about 46 per cent of her total exports and 32 per cent of our total imports.

This trade is important to us and to our neighbors to the south not only because of its vast dimensions, but because the products which we interchange in such large quantities are indispensable to almost all the economies of the hemisphere. Latin America depends upon us for the capital goods without which its economy cannot maintain its present amazing rate of growth. We, in turn, depend upon our sister republics for products indispensable to our own economy—vanadium, copper and a number of other strategic minerals, coffee and other foodstuffs.

Henry F. Holland, the Assistant Secretary of State for Inter-American Affairs, practiced law in San Antonio and Houston before he joined the State Department. A graduate of the University of the South at Sewanee, Tennessee (B.A., 1933) and of the University of Texas (LL.B. 1936), he has had wide experience with Latin-American problems both as a lawyer in private practice and in the Government.

Moreover, our dependence on the other American states, both as vital markets for our industrial and agricultural products and as suppliers of our imports essential to our economy is constantly growing. Sober forecasts indicate that within twenty years both our exports and our imports with Latin America may well double. Its economy is developing with dramatic rapidity. From 1945 to 1953 over-all economic activity in that area grew at an average rate of 5.4 per cent a year as compared to a long term trend of 3 per cent in the United States. Per capita consumption increased 26 per cent. The economic strength and progress of the hemisphere depend on the preservation and expansion of this interchange of goods and services.

During the past year and a half much thought and effort have been devoted to the formulation of sound inter-American economic policies and programs.

The recommendations made by

Dr. Milton Eisenhower after he visited the ten South American Republics in 1953, and those made by the President's Commission on Foreign Economic Policy, the Randall Commission, on which both political parties were represented, became the basis for President Eisenhower's world-wide foreign economic policy. This has been translated into specific programs designed to improve economic development and raise living standards throughout the Americas. In personal discussions and at the Rio economic conference these policies have been fully analyzed with the leaders of our sister republics in order that our efforts in the economic field may be coordinated.

Let me review these inter-American policies and say a word about what we are doing to implement them.

Our Basic Goal . . . *Better Living Standards*

Our basic goal is to make an effective contribution to the efforts of each of our sister republics to make its own national economy stronger, more self-reliant and durable, one that will mean better living standards for all its people. Why have we set ourselves this goal? Because we know that just as there is an American political and military security, there is an American economic security in which we are all partners. Whenever in any American state any of these securities is impaired every other member of the family suffers. The long-term self-interest of each of us justifies our helping others to progress steadily toward economic as well as political stability and strength.

Parenthetically let me emphasize that, while progress toward this goal will surely contribute to our united effort to eliminate Communism from our hemisphere, our purpose would be the same if there were no communist problem. We seek an acceptable standard of living in the Americas as an end in itself, not solely as a defense against Communism.

We all agree, I believe, that the primary burden of achieving this goal in each country must be borne by its own people and its own government. Nothing that the United States can do will raise living standards in another country unless the internal conditions essential for progress are already there. But if they are there, we can contribute materially to that progress by our own helpful policies.

We can help most by maintaining a strong economy here and by giving Latin America assurances of continued access to the great market that a strong United States economy represents to them. The $3½ billion in cash and credits that United States' private enterprise puts into Latin America each year in payment for her exports to us completely overshadows all financial help in the form of loans, grants or other aid. It is far more important to Latin America's economic stability that she stabilize and expand her annual dollar earnings from trade with us than that she negotiate new loans or other aid.

A one per cent decrease in her exports to us means an annual loss to Latin America of $35 million. A one per cent growth means an increase in income of the same amount.

Important as it is to Latin America, it is just as important to our own economy to preserve their existing access to United States markets. The reason is quite obvious. How does Latin America pay for that one fifth of all our exports that we look forward to selling to her year after year? How does she pay for the thousands of automobiles, trucks and radios that we ship her, the tons of butter, bacon, hams, beans, rice that our farmers count on selling her annually? Every dollar that the other American republics earn by selling in our markets is spent in payment for our own export products.

It is understandable that our domestic producers of goods that we also buy in the other American Republics press for quotas and tariff increases to exclude the competitive product, even though in many cases the foreign product comes from some plant that represents part of our own great six billion dollar investment in Latin America. To avoid actual cases, let us imagine that Mexican henequen fibre competes with United States henequen fibre in our domestic market. If by a tariff or quota we reduced Mexico's sales of henequen to the United States by $100 we would increase by $100 the amount of henequen that our own domestic producers would sell in the United States market. That increase some might say is good. But remember that it is here with our exporters that Mexico spends all the dollars she earns. When you reduce Mexico's sales of henequen to the United States by $100 you automatically reduce the sales to Mexico by our own farmers and manufacturers by $100.

Which is best? Shall we take away from some U. S. farmer a $100 sale of hams or from our manufacturer a $100 sale of radios to Mexico in order to permit the U. S. henequen producer to increase his domestic sales by $100? If that is a good idea, then we should reduce Mexico's sales of henequen in the United States. On the other hand, there is an argument in favor of the farmer who produces the ham, in favor of the manufacturer who produces the radio. That is an argument which concerns the interests, too, of our farmer who produces the beans, rice, butter and other agricultural products that we sell to Latin America, of our workmen who produce the automobiles and agricultural implements that we sell there. The truth of the matter is that so long as every dollar that a Latin American producer earns through exports to us is spent to buy imports from us, you do not help the United States economy as a whole by reducing his access to our markets. All you do is take a given amount of business away from some U. S. businessman, workman or farmer who is producing for the export market and give it to one who is producing for the domestic market.

But in all of these problems of inter-American trade there is the argument of the Latin Americans them-

(Continued on page 763)

Activities of Sections and Committees

SECTION OF TAXATION

▪ The Tax Section of the Association will present a Federal Tax Practice Clinic in the Rose Room of the Hotel Bellevue-Stratford on August 23, 1955, as one of the features of its series of meetings during the Annual Meeting. The Practice Clinic, which will be conducted as an all-day session, will cover the presentation of a typical federal estate tax case from its inception with the revenue agent's examination to its trial in the Tax Court.

The morning session will be devoted to the administrative handling of the case, including negotiations with the revenue agent, and conferences with the group chief and representatives of the Appellate Division. Certain issues in the case will be disposed of at various administrative levels, leaving for trial a contemplation-of death-question.

The afternoon session will be devoted to the trial. Morton P. Fisher, Judge of the Tax Court of the United States, will act as the Tax Court judge and representatives of the Internal Revenue Service will play their real life roles. Members of the Philadelphia Bar will represent the taxpayer and play the role of witnesses.

A booklet containing copies of all the documents used in the case, including the revenue agent's report, the taxpayer's protest, the petition to the Tax Court and the trial brief of taxpayer's counsel, will be distributed to the audience at the beginning of the morning session.

COMMITTEE ON TRAFFIC COURT PROGRAM

▪ Cognizant of the need to bring to court officials a realization of their important role in the Traffic Safety program, the New Brunswick Safety League held a special Conference for court and enforcement officials on June 14, 1955, at Headquarters "J", Division, Royal Canadian Mounted Police on Woodstock Road, Fredericton, New Brunswick.

County and city magistrates, representatives of the Attorney General's Department, personnel of the Motor Vehicle Department and other persons interested in traffic safety participated.

Since this was the first Conference ever held in the Provinces of Canada for magistrates, James P. Economos, Director of the Traffic Court Program of the American Bar Association, was able to present to the Conference his experience, training and knowledge in the traffic court field. This proved of great value in helping to develop a greater interest in a co-ordinated, effective traffic court enforcement program throughout the Province. It also started the machinery rolling with respect to co-ordination and co-operation between the two countries in traffic safety. Up until this time, the only contact between the two countries was the participation of four magistrates and prosecuting attorneys from Canada in the Annual Traffic Court Conference at Northwestern University, Chicago, Illinois, sponsored by the American Bar Association and the Northwestern University Traffic Institute.

With this new pioneer effort by the New Brunswick Safety League, there should be greater awareness in the provinces of Canada of the roles that a magistrate and prosecuting attorney play in better traffic law enforcement. Also, a closer tie between the two countries in promoting better traffic court personnel and administration.

International Congress on Criminology

▪ The Third International Congress on Criminology will be held in London, September 11 to 18. The subject of recidivism will be studied under five headings: definitions of recidivism and their statistical aspects; descriptive study of forms of recidivism and their evolution; causes of recidivism; prognosis and treatment of recidivism. Reports and papers under each of the five headings are invited. The last day of the Congress will be taken up with the general meeting of the International Society for Criminology and will be open only to members of that Society. Membership in the Society is open to all scientists, medical men, judges, magistrates, lawyers, officials dealing with crime and criminals, penal administrators and officers, police and police scientists, probation officers, social workers and others who are interested in or concerned with the subject of criminology in general or recidivism in particular. All communications concerning the Congress should be addressed to The Organizing Secretary, Third International Congress on Criminology, 28 Weymouth Street, London, W. 1, England.

Books for Lawyers

JONATHAN BLAIR: BOUNTY LANDS LAWYER. *By William Donahue Ellis. Cleveland and New York: The World Publishing Co. 1954. $4.95. Pages 464.*

The law student who today reads the decisions of the Supreme Court in *McCulloch* v. *Maryland*[1] and in *Osborn* v. *The Bank*[2] readily accepts as self-evident the conclusions reached by the Court. It is hard for him to realize that the issues settled by those decisions were such as to threaten the integrity of the Union. He probably has little conception of the intensity of the struggle during President Monroe's Administration between the newly chartered Bank of the United States and the local state banks upon the solvency of which depended the welfare of the people of the Southwest. If he is interested to learn the historical facts he will read Chapter XXXVI of McMaster's *History of the People of the United States.* If he wishes to see a moving picture of the impact of these issues upon the lives and fortunes of early settlers in Ohio he will do well to read the brilliant historical novel which Mr. Ellis has now produced.

Jonathan Blair was an Ohio attorney-at-law, practicing in the frontier community of Mesopotamia. He represented settlers of "Bounty Lands" for which his clients were bound to make certain deferred payments to the local Land Office. These clients were the holders of notes issued by various local state banks. Many of these notes had been exchanged for the more stable paper of the Bank of the United States, the transaction taking the form of a loan from the bank to the settler on the security of a mortgage on the borrower's land.

When Gideon Schaacht, the Western Manager of the United States Bank, proposed to call the loans of the settlers they were about to pay the deferred instalments of purchase money upon their lands, using for the purpose local bank notes to supplement such paper of the Bank of the United States as they had been able to borrow. Before the deferred payments could be made, well-founded rumors of the insolvency of many state banks led the Land Office to refuse acceptance. This refusal, combined with Schaacht's threatened foreclosures, spelled ruin for the settlers. Jonathan Blair, striving manfully in the interest of his clients and often at the risk of his life, was nevertheless frustrated in his efforts to induce the Land Office to accept what his clients were able to tender. His failure was in large measure due to the adverse influence of Schaacht and to the subtle hostility of a leader of the Wyandot Indians whose hatred of Blair was intense. The United States Bank had thus become the creditor not only of the settlers, but of the local banks whose notes it held.

Blair next sought an act of the Ohio legislature taxing the branches of the United States Bank in Ohio so heavily as to drive it from the state. When (again because of Schaacht's influence) the act failed to pass, Blair sought legal relief by attacking the constitutionality of the act creating the United States Bank. The Circuit Court having decided against him, he appealed to the Supreme Court only to have an affirmance of the judgment of the lower court. Undaunted he then negotiated with Schaacht a settlement by which his clients were to cede to the bank a part of the mortgaged lands while retaining the residue for themselves. When this settlement had been consummated Schaacht discovered too late that there were no means of access by land to any portion of the lands ceded and that he could not claim a "way of necessity" because the ceded land could be reached by water—although this made its use for farming quite impracticable. Thus suddenly, after successive defeats, Blair won for his clients a substantial victory. As the result of his resourcefulness his clients were enabled to extract from Schaacht various important concessions which insured their future welfare.

This colorless outline of Blair's professional efforts gives little idea of the intense interest which the novel arouses in the reader. All the incidents are narrated with a vividness which gives to the book a certain dramatic quality. Those of us to whom the practice of law sometimes seems prosaic will be interested to learn how readily under frontier conditions the life of an attorney-at-law can take on all the characteristics of tragedy, comedy and melodrama.

Into the narrative of events of historical interest is woven with skill a thread of romance. How Blair and Hope Emerson, although at first antagonistic, afterward became lovers and how in the end the lawyer won her for his wife makes of the story a charming romance.

A reading of this book will be found entertaining and instructive. If the reader is a lawyer it will for him be doubly rewarding for at every stage of the narrative he will be finding interesting contrasts between the conditions under which he practices his profession and those amid which Jonathan Blair attained a well-deserved reputation.

GEORGE WHARTON PEPPER
Philadelphia, Pennsylvania

POLICE WORK WITH JUVENILES. *By John P. Kenney and Dan G. Pursuit. Springfield, Illinois: Charles C. Thomas. 1954. $7.75. Pages xxi, 371.*

1. 4 Wheat. 316 (1819).
2. 9 Wheat. 738 (1824).

Although juvenile delinquency has been present in the world perhaps from the day Cain slew Abel, our increased awareness of it is constantly more apparent, evidenced by the numerous books and articles published on the subject. Far too often this material makes its appeal by sensationalism, failing to offer the practical suggestions desired by the cognitive reader who wishes not only to be informed but also to work toward the mitigation of the severity of the problem.

Now at last two ably qualifed men have produced a book designed primarily for law-enforcement agencies, but executed so lucidly and effectively that it may well serve as a guide for any citizen interested in the intelligent community handling of juveniles.

Theorizing that policemen have strategic opportunities for work with youth of all types, the authors have drawn upon their experience as former law-enforcement officers and current faculty members of the University of California to conclude, in a very satisfyingly uncomplicated style, that police departments can make important contributions to the welfare of youth through efficient and perceptive handling of cases, through the utilization of community rehabilitation facilities and through objective teamwork with all available community resources.

Explicit directions are given for the organization and administration of juvenile programs in police forces employing ten to two hundred men. Used as a handbook, the first section offers helpful detail in the selection and training of juvenile officers—both men and women—in the keeping of records, in the discussion of the fields of service suitable to juvenile-program personnel, in the special problems they will meet, and in departmental public relations.

Recognizing that "the core of good police-juvenile work is the officer's ability to individualize each case", the authors have presented concisely but comprehensively a chapter on personality and mental health, and another on the causes of delinquency, the two combining in a forceful reminder that each child has special needs which must be met if a juvenile program is to succeed. Logically, the following chapters list special techniques of interviewing, investigation and dispositions that aid in the individualizing of cases.

Policemen by the nature of their work and training are the appropriate candidates for leadership in the community's effort to prevent crime and anti-social behavior. The final major section offers a challenge to the officer to feel in his off-duty time the same responsibility which motivates his duty hours. At his instigation, churches, schools and civic groups can combine in a concerted effort to help youth adjust to its complex needs.

The challenge extends to any citizen. Anyone may start a chain reaction. Using as criteria the plans of organization and action co-ordinated in this volume, the concerned citizen can work with community organizations to help his local police unit meet the standards necessary for the capable control of juveniles.

The clarity of instruction, the proof of functional example, and the sound common sense evident throughout the text stimulate the impression that at last has been submitted to the public an intelligent, reliable, and workable approach to one of the most perplexing problems of our kaleidoscopic scene.

FRANCES CRAIGHEAD DWYER
Atlanta, Georgia

LAW OF CONTRACTS. *By Walter H. E. Jaeger. Buffalo: Dennis and Co., Inc. 1953. Pages xv, 692. $7.50.*

Jaeger's approach is refreshingly practical. He lets the judges state the law. The basic principles of contract law are found in direct quotations from the actual opinions in decided cases. These are taken from practically every jurisdiction in the United States. This method should commend itself because it is so essentially realistic. After all, persuasive though the writings of the authorities may be, in the final analysis, it is the case in point that counts.

At some time in his career, Dr. Jaeger must have been made aware of the opening statement of Lord Chief Justice Alverstone in the classic case of *West Rand Central Gold Mining Company* v. *The King*, L. R. [1905] 2 K. B. 391. Although in a somewhat different field of law, these remarks of the Lord Chief Justice might well be applied to any branch of the common law: "The views expressed by learned writers on international law have done in the past, and will do in the future, valuable service in helping to create the opinion by which the range of the consensus of civilized nations is enlarged. But in many instances their pronouncements must be regarded rather as the embodiments of their views as to what ought to be, from an ethical standpoint, the conduct of nations inter se, than the enunciation of a rule or practice so universally approved, or assented to as to be fairly termed, even in the qualified sense in which that word can be understood in reference to the relations between independent political communities, 'law.' "

The brevity and succinctness of the *Law of Contracts* is the second innovation. And a most welcome one. Within the past thirty years or so, law books seem to have grown in size. Whether intended for student use or as handbooks, their size has become appalling. A recent survey shows that many of the books on contract law exceed a thousand pages; very few are below 900 pages. In consequence, this handy volume is certain to be greeted with enthusiastic acclaim not only by the many thousands of Professor Jaeger's former students in contracts, but by other practitioners (including this reviewer) as well. This brevity in itself is a work of art and reminds us of the words often attributed to Voltaire who, in concluding a rather lengthy letter to a friend, wrote "I regret the length of this letter but I did not have time to write a short one." In his selection of materials, Dr. Jaeger has shown judicious care,

and a fine sense of discrimination. His editorial work could hardly be improved upon. The quotations have made possible this abbreviation, and they show skillful judgment and painstaking care. Chosen from thousands of cases, they reflect Dr. Jaeger's long experience in the field of contracts. The manner in which they have been assembled, and the careful excision of unnecessary material is truly masterful. Here is a remarkable combination of the classic decisions, such as *Lawrence* v. *Fox, Adams* v. *Linsell, Kirksey* v. *Kirksey, Miami Coca Cola Bottling Co.* v. *Orange Crush Company, Dickensen* v. *Dodds* and *Raffles* v. *Wichelhaus,* to mention but a few, with the most recent and altogether modern cases.

Another feature which commends itself is the decided limitation of "attention-dividing" footnotes. An excellent index completes the volume. In addition to the volume table of contents there is also one for each chapter which indicates the development of the subject in each of the sections of the book.

The author's development of the subject is quite conventional in that he introduces his reader to the formation of a contract in Part I; Part II deals with contractual rights and duties and in the third and final part enforcement and termination are covered. Perhaps the outstanding chapter is the one dealing with consideration. Here the selection of illustrative materials is a profound tribute to Dr. Jaeger's diligent research. The material on the Statute of Frauds might have been made more comprehensive and greater coverage given, but this is hardly a serious defect since there are authoritative treatises on the statute that the lawyer will have recourse to when confronted with a necessity therefor.

At times, a certain amount of repetition in the judicial utterances is detected but this may well be intentional to demonstrate the rather universal acceptance of the basic principles of contract law.

Some reviewers might feel warranted in criticizing Dr. Jaeger for his failure to include more frequent references to legal periodical literature. However, having established a maximum length, namely, 700 pages, it is clear that a sacrifice had to be made somewhere.

It is to be hoped that this concise treatment will mark a new trend in the literature of the law, and that the emphasis will be on selectivity and quality rather than on dispersion and diffusion. All in all, the book represents a distinct contribution to this literature. It will be a welcome addition to the active practioner's library.

CHARLES S. RHYNE
Washington, D. C.

THE POLITICAL WRITINGS OF THOMAS JEFFERSON, Representative Selections. *Edited by Edward Dumbauld. New York: The Liberal Arts Press. 1955. $2.25 (cloth), 90¢ (paper). Pages xli, 199.*

When I was asked if I would review this book, I said I would because I had acquired a high regard for the previous work of Edward Dumbauld and because I thought it was high time that we reconsider the principles on which this government was founded and check the divergent trends of our time.

The first two sentences of the Introduction express the feelings that I had at the time:

> An intelligent understanding of American traditions and institutions is more important today in the light of world events than ever before. Indispensable in that connection is a thorough knowledge of Thomas Jefferson's political philosophy and his impact upon American life during its formative years.

The book is well done and should serve well its purpose.

Jefferson's writings are so extensive and voluminous that few people would have the time to read them all and cull out the significant parts. Mr. Dumbauld has made excellent selections and his introduction and annotations bring them into relation and pertinence. The introduction deals briefly with:

I. Jefferson's Political Significance,
II. Jefferson's Life,
III. Jefferson and Political Parties,
IV. Jefferson's Political Writings, and
V. Jefferson's Political Theory, which includes the Purpose of Government, the Form of Government and the Spirit of Government.

In a few pages, and in clear and concise diction, we are given Jefferson's views on the most pertinent questions of political philosophy.

Dumbauld bases the importance of Jefferson's writings on the fact that he was the foremost spokesman of "the American mind". He does not digress into a discussion of the origin of the principles announced by Jefferson. In discussing the Declaration of Independence, which is properly set forth as "Jefferson's best-known State paper", Dumbauld quotes Jefferson himself in answer to the critics who questioned or denied the originality of the Declaration:

> When forced, therefore, to resort to arms for redress, an appeal to the tribunal of the world was deemed proper for our justification. This was the object of the Declaration of Independence. Not to find out new principles or new arguments never before thought of, not merely to say things which had never been said before, but to place before mankind the common sense of the subject in terms so plain and firm as to command their assent, and to justify ourselves in the independent stand we are compelled to take. Neither aiming at originality of principle or sentiment, nor yet copied from any particular and previous writing, it was intended to be an expression of the American mind, and to give to that expression the proper tone and spirit called for by the occasion. All its authority rests then on the harmonizing sentiments of the day, whether expressed in conversation, in letters, in printed essays, or in the elementary books of public right, as Aristotle, Cicero, Locke, Sidney, etc.

It need not detract in the least from the originality and forthright courage of other men, such as George Mason, George Washington, John Adams, *et al.,* if we accept Jefferson as the chief spokesman of the fundamental principles of government.

Other biographers and historians have acclaimed Jefferson for having given currency and brought acceptance to the principles incorporated in the Declaration and the Constitution.

In addition to the Declaration, the book sets forth or quotes from other state papers, drafts of constitutions, statutes, resolutions, public addresses, proposed ordinance of 1784, and significant letters and private correspondence. The writings are given a helpful classification under six chapter headings:

1. Fundamentals of Rightful Government,
2. The Blessings of a Free Government,
3. Government Founded on the Will of the People,
4. The Value of Constitutions,
5. The True Principles of the United States Constitution,
6. The Great Family of Mankind.

Not only in the last chapter, but through all Jefferson's writings is a clear revelation of his expectation that this nation's present position of world leadership would come to pass. Jefferson spoke of the Declaration as "an instrument pregnant with our own and the fate of the world". He said:

> May it be to the world what I believe it will be (to some parts sooner, to others later, but finally to all), the signal of arousing men to burst the chains under which monkish ignorance and superstition had persuaded them to bind themselves and to assume the blessings and security of self-government. That form which we have substituted restores the free right to the unbounded exercise of reason and freedom of opinion. All eyes are opened, or opening, to the rights of man.

No one can doubt that Jefferson's constant aim was "the complete emancipation of the human soul", but it may also be said that no one who studies the writings of Jefferson can doubt his conviction that efficient government is an absolute requirement for the peace and happiness of mankind. He insisted that government should be founded on the will of the people and that its object should be the welfare of the people, but he entertained no idea that government could be operated by plebiscite or popularity polls. He believed that men were capable of self-government, but he also acknowledged that "The qualifications for self-government are not innate. They are the result of habit and long training." He emphasized the importance of a written Constitution, and "recognized the value of judicial enforcement of Constitutional limitations upon the legislative power", and the right to an impartial judge.

When I came to a consideration of the divergencies from original principles and the extent to which our policies and practices have drifted toward extreme democracy, and the corresponding disintegration of vigorous and efficient government, I became painfully aware that a full presentation of the need of this book could not possibly be made within the limitations of an ordinary review.

Thirty years ago I had begun a study of the digressions of our government from the principles of the founding fathers. I began to make notes and references to pertinent quotations from authoritative writers. I turned to these notes and references, but was struck at once with a sense of despair. They were so numerous and extensive that a fair statement of their contents would require a separate article or a small book. It was surprising to me to see how many reputable students and commentators were alarmed over the debilitating effect of popular trends.

While wondering how I could present in brief space the critical need of this book, the issue of *U. S. News and World Report* of April 22, was published, with the following words on its front cover, "DEMOCRACY'S SICKNESS—And a Way To Cure It, by Walter Lippmann". On page 58, an editor's note announces the publication of "The Public Philosophy", in which "Mr. Lippmann finds that democracy has slipped a long way in the last half century", and says that if democracy is to survive, then the public philosophy that fostered the growth of Western democracy must be revived among the people. The editorial note is followed by extensive extracts from Lippmann's book.

I read the extracts and found that Mr. Lippmann had used some of the same references and quotations that I had collected. I, therefore, refer the readers of the JOURNAL to that issue of *U. S. News* or to Mr. Lippmann's book. It might be well also for them to read in the April first issue of *U. S. News* "The 'Flop' of a Century," and "How Much Do Voters Know or Care", in the last issue of the *Journal of the American Judicature Society*.

The publication of Dumbauld's book just before the publication of Lippmann's book is so timely that it seems to be providential. The problem is, however, how can Americans be aroused to the necessity of reading these books? The greatest danger in democracy's sickness is that it begets a fever which in turn creates a false confidence that blinds its victims to the symptoms of the disease. The flattery and pandering tactics of self-seeking politicians and demagogues create a public attitude of apathy or arrogance.

But as Newton D. Baker observed more than twenty years ago, the attempt to cure the evils of democracy by more democracy, if continued, will undermine the foundations of our government. Many other statesmen, commentators and columnists have voiced alarm over the tendency to play down to the popular fancy. Unless the people accept the limitations of democracy, and return to the representative republic which the founders established here, unless they devise methods by which the true leaders, which evolution creates, can be recognized and followed, the strength and virility of this nation will not last much longer.

If Jefferson's faith in education and the capacity of men to govern themselves is to be justified, those engaged in education should begin at once to impress upon the minds of students in high schools and col-

leges that the body politic, like the individual body, is healthy and efficient only when disciplined and trained. The need of a revival is apparent. A crusade should be acclaimed from forum, pulpit, lectern, masthead and broadcasting station. And lawyers should sound the tocsin, carry the torch, and lead the advance guard.

ROBERT N. WILKIN

Charlottesville, Virginia

THE PREPARATION OF COMMERCIAL AGREEMENTS. *By Ludwig Mandel. New York: Practicing Law Institute. 1955. $1.50. Pages 100.*

This monograph is one in the series on general and trial practice, of which Roscoe Pound is General Editor; Harold P. Seligson is Editor of the monographs devoted to general practice. The series totals approximately 1350 pages and is priced at $15.00. Single monographs are $1.50, $2.00 and $2.50 each. Catalogue and prices may be obtained from Practising Law Institute, 20 Vesey Street, New York 7, New York.

The author of this monograph, Ludwig Mandel, is a member of the New York Bar, holds the degrees of Bachelor of Commercial Science and Bachelor of Laws, and lectures on commercial agreements and related subjects at the Practising Law Institute.

This monograph is intended primarily for the lawyer with limited experience in drafting commercial agreements. It is designed to bridge the gap between a textbook and a form book.

The discussion is divided into three parts: the first deals with commercial agreements generally, the second with sales and purchase agreements, and the third with employment contracts.

Certain agreements are dealt with more fully in separate monographs, such as the sale or leasing of realty, agreements involving guaranties and collateral security, and income and other taxes.

The New York statutes and decisions have been relied upon almost exclusively with only passing reference to federal statutes and regulations. Accordingly, lawyers in other states are advised to consult their local as well as federal laws.

The author cautions that commercial agreements are varied and that there are no set rules and that the suggestions in this monograph are intended as general guides.

Nevertheless it requires only a glance to see that this monograph would be of great assistance to the general practitioner in the preparation of commercial agreements.

BENJAMIN WHAM

Chicago, Illinois

DIGEST OF THE PUBLIC RECORD OF COMMUNISM IN THE UNITED STATES. *New York: Fund for the Republic. 1955. $5.00. Pages 753.*

BIBLIOGRAPHY ON THE COMMMUNIST PROBLEM IN THE UNITED STATES. *New York: Fund for the Republic. 1955. $5.00. Pages 474.*

In the first of the two books listed, the Fund for the Republic has collected excerpts from legislative hearings, statutes, annotating decisions and regulations concerning Communism in the United States. Federal, state and municipal authorities are cited and digested. The material is classified under topics such as "Exclusion from the Bar". A section thereafter lists the important public documents on the Communist question under the name of the issuing agency. There is a topical guide to the public documents and a comprehensive index.

The bibliography volume supplies a need which was quite apparent to the Fund when it undertook its study of Communism in the United States. The bibliography covers the period from 1919 through 1952. In the author index, one notes references to articles in the AMERICAN BAR ASSOCIATION JOURNAL and the well-known American Bar Association Special Committee on Communist Tactics, Strategy and Objectives' *Brief on Communism*. Following the author index is one classified by subject, such as, Communism and American Institutions: Schools and Colleges. Among five appendices is a short general reading list on Communism. Since this volume does not contain government documents, the two should be used together.

While work was in process on the first volume noted, the *Digest*, the Fund for the Republic decided to microfilm the records of twenty-three important American trials concerning Communism. The films have been deposited in several libraries throughout the country and the Fund has also distributed the two books to libraries and educational institutions. Prices of the books are given and we are informed that a microfilm copy of the trials can be purchased for approximately $330.00 from Microfilm of New England, Inc., 806 Massachusetts Avenue, Cambridge 39, Massachusetts.

A special committee was appointed by the Fund to supervise the work on the film and the two books. Its membership has included Charles Fairman, of Washington University; Clinton Rossiter, Cornell University; Joseph M. Snee, S.J., Georgetown University, and Arthur E. Sutherland, of Harvard University. The work was done at Harvard University under the immediate direction of the editor, Charles E. Corker. Mr. Corker was formerly on the law faculty at Stanford University and on completion of this assignment for the Fund joined the California Attorney General's legal staff on the Colorado River Board in Los Angeles.

JOHN C. LEARY

Chicago, Illinois

HOW TO COMPLY WITH THE ANTITRUST LAWS. *Edited by Jerrold G. Van Cise and Charles Wesley Dunn. Chicago: Commerce Clearing House, Inc. 1954. $7.50. Pages 402.*

The present volume is in no sense merely a revised edition of various symposiums of the New York State

Bar Association published within the last few years; on the contrary, both in arrangement and content it wholly supersedes the earlier discussions. During recent years many contributions of statute and case law have been forthcoming, and these with other materials have now been incorporated into an outstanding story of American trade regulation. The papers here should satisfy serious scholars and general practitioners alike by their evidence of labor and learning. Both style and accuracy are praiseworthy in every respect. Mr. Van Cise is Chairman of the Committee on Information and Education, American Bar Association Section of Antitrust Law; Chairman of the Committee on the Clayton Act, Antitrust Law Section of the New York State Bar Association; Chairman of the Section of Trade Regulation in the Committee on Post-Admission Legal Education, The Association of the Bar of the City of New York; and Member of the Attorney General's National Committee To Study the Antitrust Laws.

Mr. Dunn is Chairman of the Antitrust Law Section of the New York State Bar Association and member of the Attorney General's National Committee To Study the Antitrust Laws.

The editors of this collection of material have been outstanding in educating Bench and Bar respecting developments within the field of antitrust enforcement. Each has long been recognized as an authority as to that branch of public law, so that any selection presently offered by them must necessarily prove most valuable. In addition, Mr. Van Cise has included many helpful contributions from his own pen, thus affording constructive assistance to the general lawyer whose occasional contact with antitrust laws has to be fitted into the background of crowded practice.

These essays constitute in effect an abridged treatment of the law of trade regulation, available for use both as a ready-reference manual and as a comprehensive survey of existing antitrust policy. The presentation serves a practical purpose of combining almost in primer-like fashion leading cases and elementary text discussion, along with stimulating problems reflecting more difficult phases of governmental activity. Modestly attempting broad generalization within the field of business control, the scope has been kept down to very reasonable limits. Text discussion is lucid and readable and avoids tiresome analysis of legalistic detail. Nor have the editors forgotten here that serious subjects do not suffer in handling where there is an occasional humorous touch.

Present-day antitrust doctrine with all existing improvements is often not quite as certain nor as precise as one might expect. Those shortcomings are usually ascribed, at least in part, to rapid expansion of business combinations in this country during formative decades before and after 1900 and to legislative vagaries regulating such early mergers; but if proof as to the pervading influence of economics and political theory were required, brief examination of the various discussions here should adequately suffice. Legal logicians may reason about Sherman Act abstractions; it was compelling business instinct that drove industrial leaders to invite statutory rebuke in promoting their competitive expansion. And therein lies much of the explanation for eventual departure from the old law in books embodying common-law rules as to restraint of trade, and modern principles that actually govern commercial groups in twentieth-century society. When two years ago the Attorney General concurred in prevalent sentiment for further reflection and review by establishing a National Committee To Study the Antitrust Laws, it was simply another recognition of the necessity for competitive enterprise within the framework of complex industrial needs in both domestic and foreign commerce. The law had broadly advanced from particular images to general terms.

The topics considered encompass the entire topic of antitrust legislation,—*understanding the present* while *evaluating the past* and *forecasting the future.* There are separate divisions of subject-matter having to do with choice of customers, quotations to customers, control over customers and contact with competitors. Just as at the start Mr. Van Cise has "laid the foundation" by thorough analysis of client relations, so towards the end he has set forth in clear and unmistakable terms the "mechanics of compliance". Other authorship as to individual papers includes principal law-enforcement officers as well as outstanding members of the Bench and Bar. All told, the list of contributors takes in a score of busy practitioners with expert knowledge as to each particular phase or problem being discussed. While many of the papers printed here were in fact delivered at past antitrust gatherings of the New York State Bar Association, each has been revised to date and thus combines to offer a true present-day picture of national policy as to trade regulation.

The importance of the present volume to the legal profession is obvious. With knowledge that is both extensive and proved, there have been collated sound explanations for more important antitrust fundamentals. The editors are accordingly to be commended for most satisfactory performance of their undertaking. If the characteristics of a book most important to the reader in this day and age are interest and clarity, this manual in both meets the requisite standard.

Taken as a whole, it is thus a most useful and informing collection of material worthy of success in its field. It will rank along with the Report of the Attorney General's National Committee as an enlightening source for the future. The footnotes contain valuable citations as to the various matters considered and have the merit of really clarifying the text. One ought to add that there are virtually no errors of print, though the index is barely adequate.

CURTIS C. WILLIAMS, JR.
Cleveland, Ohio

Review of Recent Supreme Court Decisions

George Rossman
EDITOR-in-CHARGE

Admiralty . . . *contract against liability for negligence*

■ *Bisso* v. *Inland Waterways Corporation,* 349 U. S. 85, 99 L. ed. (Advance p. 523), 75 S. Ct. 629, 23 U. S. Law Week 4205. (No. 50, decided May 16, 1955.) *Judgment of the Court of Appeals for the Fifth Circuit reversed.*

This case settled a long-standing divergence of opinion among the circuits as to whether a towboat may validly contract against all liability for its own negligence. The Court held that such a contract violates public policy, although three justices joined in a vigorous dissent.

The oil barge *Bisso* was being towed up the Mississippi River by respondent's towboat *Cairo.* The towed vessel collided with a bridge pier and sank, the collision being caused by the negligent operation of the towboat. The contract of towage provided that the towing movement was at the "sole risk" of the barge and that the master, crew and employees of the towboat should "in the performance of said service, become and be the servants" of the *Bisso.* The District Court, sitting in admiralty, held that this provision exempted the towboat owner from liability and the Court of Appeals affirmed.

Mr. Justice BLACK delivered the opinion of the Supreme Court reversing. The Court found precedent for its decision in *The Syracuse,* 12 Wall. 167 (1871), and *The Wash Gray,* 277 U.S. 66 (1928). The Court said that its rule was "merely a particular application to the towage business of a general rule long used by courts and legislatures to prevent enforcement of release-from-negligence contracts in many relationships". Two reasons were given for the rule: "(1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being overreached by others who have power to drive hard bargains".

Mr. Justice HARLAN took no part in the consideration or decision of the case.

Mr. Justice FRANKFURTER, joined by Mr. Justice REED and Mr. Justice BURTON, wrote a dissenting opinion. This opinion disputed the Court's finding that *The Syracuse* and *The Wash Gray* were precedents for the decision and argued that there was no inequality of bargaining power between the parties to the towage contract and that there was no reason why the parties should not be free to distribute the risk as they saw fit.

The case was argued by Eberhard P. Deutsch for petitioner and by Ralph S. Spritzer for respondent.

■ *Boston Metals Company* v. *SS. Winding Gulf,* 349 U. S. 122, 99 L. ed. (Advance p. 543), 75 S. Ct. 649, 23 U. S. Law Week 4215. (No. 70, decided May 16, 1955.) *Judgment of the United States Court of Appeals for the Fourth Circuit reversed.*

This was a companion case to No. 50, *supra. The Winding Gulf* collided with petitioner's vessel, while the latter was being towed by the *Peter Moran.* The district court found that the collision was caused by negligent navigation of *The Winding Gulf,* lack of lights on the damaged vessel and absence of a crew on the damaged vessel. The absence of lights and crew was the fault of the master of the tug *Peter Moran* and was imputed to petitioner because the towage contract provided that the master and crew of the tug became the servants of the petitioner and that the towage company would not be responsible for their failure. The district court divided damages equally between petitioner and respondents and the Court of Appeals affirmed.

The Supreme Court, again speaking through Mr. Justice BLACK, reversed, citing *Bisso* v. *Inland Waterways Corporation,* as controlling.

Mr. Justice HARLAN took no part in the consideration or decision of the case.

Mr. Justice FRANKFURTER wrote a concurring opinion in which he said that the language of the contract did not indicate an agreement on the part of the owners of the towed vessel to undertake direct liability to third persons.

Mr. Justice BURTON, joined by Mr. Justice REED, dissented, arguing that the language was sufficient to make the towed vessel's owners directly liable to third parties.

Mr. Justice DOUGLAS wrote an opinion concurring in both No. 50 and No. 70. He took the position that the "established rule of *The Syracuse*" should not be changed "unless and until Congress" changed it. The Court did not know enough about the economics and the organization of the tugboat industry to alter the established judicial policy, the opinion argued.

The case was argued by John H. Skeen, Jr., for petitioner and by Charles S. Bolster for respondent.

■ *United States* v. *Nielson,* 349 U. S. 129, 99 L. ed. (Advance p.548): 75 S. Ct. 654, 23 U. S. Law Week 4222. (No. 210, decided May 16,

Reviews in this issue by Rowland Young

1955. *Judgment of the United States Court of Appeals for the Second Circuit reversed.*

In the third of the cases regarding the validity of clauses purporting to exempt tugboat owners from liability for negligence, the Court again refused to give effect to the clause.

The respondent contracted to use two of its tugs to assist the United States, as owner of the steamship *Christopher Gale,* to move the latter vessel from Hoboken to Brooklyn. The contract provided that a tugboat captain or pilot aboard the *Gale* would become "the servant of the owners of the vessel assisted . . . and neither those furnishing the tugs and/or pilot nor the tug, their owners, agents, or charterers shall be liable for any damage resulting therefrom". One of the respondent's tug captains went aboard the Government's vessel during the moving operations. The two tugs of the respondent were fastened to the *Gale* to assist in its movements. One of the tugs was crushed between the *Gale* and a pier while carrying out a maneuver under the orders of the tug captain aboard the *Gale.* The respondent brought this suit to recover damages from the United States, alleging that the captain was temporarily the "servant" of the *Gale.* The District Court awarded damages and the Court of Appeals affirmed.

Mr. Justice BLACK, speaking for the Supreme Court, reversed, saying that an agreement that one shall not be liable for negligence of a third person "cannot easily be read as an agreement that one is entitled to collect damages for negligence of that third person". The Court added that clear contractual language to the contrary might change the result, but the language here did not meet that test. The Court distinguished *Sun Oil Company* v. *Dalzell Towing Company,* 287 U. S. 291.

Mr. Justice HARLAN took no part in the consideration or decision of the case.

Mr. Justice BURTON, joined by Mr. Justice REED, argued in a dissenting opinion that "full effect" to the agreement should be given.

The case was argued by Ralph S. Spritzer for petitioner and by Anthony V. Lynch, Jr., for respondent.

Constitutional Law . . . *restrictive covenants*

■ *Rice* v. *Sioux City Memorial Park Cemetery, Inc.,* 349 U. S. 70, 99 L. ed. (Advance p. 507), 75 S. Ct. 614, 23 U. S. Law Week 4195. (No. 28, decided May 9, 1955.) *Certiorari to the Supreme Court of Iowa dismissed as improvidently granted.*

An Iowa cemetery's refusal to allow burial of a Winnebago Indian, which aroused nationwide attention two years ago, has been allowed to stand although, by implication at least, the Supreme Court holds the refusal a violation of constitutional rights.

This was a suit for damages for mental suffering filed by the widow of the Indian. The Iowa Supreme Court ruled that the clause in the cemetery deed restricting burial to "members of the Caucasian race" was unenforceable, under the doctrine of *Shelley* v. *Kraemer,* 334 U.S. 1, but nevertheless was available as a defense to the widow's suit. The case was brought to the Supreme Court which affirmed by an evenly divided court last November. In the present decision, the Court took the unusual step of vacating its previous ruling and dismissing the writ of certiorari as improvidently granted.

Mr. Justice FRANKFURTER, speaking for the Court, explained that an Iowa statute, passed after the original furore over the cemetery's action, reduced the case to one of minor importance. The statute made it unlawful for any cemetery corporation to refuse burial "solely because of the race or color" of the deceased. This statute was not seen in proper focus when the case was argued before the Court, the opinion stated, because it was blanketed by the constitutional arguments presented. Its existence bars the ultimate question presented from arising again in Iowa, and accordingly there was no "special and important reason" for granting certiorari within the meaning of Rule 19 of the Supreme Court's Rules. The Court cited some sixty cases where certiorari had been dismissed after full argument before the Court.

The case had aroused further interest because of counsel's arguments that the cemetery lot deed also violated the provisions of the U.N. Charter. The Iowa Supreme Court had brushed aside this question as irrelevant. Speaking of its original affirmance by even division of the Iowa court's holding, the Supreme Court declared: "The Iowa courts dismissed summarily the claim that some of the general and hortatory language of this Treaty [the U.N. Charter], which so far as the United States is concerned is itself an exercise of the treaty-making power under the Constitution, constituted a limitation on the rights of the States and of persons otherwise reserved to them under the Constitution. It is a redundancy to add that there is, of course, no basis for any inference that the division of this Court reflected any diversity of opinion on this question."

Mr. Justice HARLAN took no part in the consideration or decision of the case.

In a dissent in which the CHIEF JUSTICE and Mr. Justice DOUGLAS joined, Mr. Justice BLACK declared that the Court's opinion left every person in Iowa free to prosecute a claim of this nature except the petitioner, and that this raised a question of denial of equal protection. "We cannot agree that this dismissal is justified merely because this petitioner is the only one whose rights may have been unconstitutionally denied" the dissent said.

The case was argued by Lowell C. Kindig for petitioner and by Jessie E. Marshall for respondent.

Constitutional Law . . . *contempt committed before one-man grand jury*

■ *In the Matters of Murchison and White,* 349 U. S. 133, 99 L. ed. (Advance p. 551), 75 S. Ct. 623, 23 U. S. Law Week 4218. (No. 405, decided May 16, 1955.) *Judgment of*

the Supreme Court of the State of Michigan reversed.

May a judge, acting as a "one-man grand jury", as authorized under Michigan law, proceed to try for contempt a witness that refused to testify before such a "grand jury" hearing? The Supreme Court here held that such a trial was a denial of due process.

The petitioners were called as witnesses before a Michigan judge sitting as a "grand jury". Murchison's testimony left the judge convinced that he had committed perjury. White refused to answer questions on the ground that he was entitled to counsel. The judge ruled that this constituted contempt. The judge then proceeded to try for contempt and sentence both petitioners in open court. The sentences were upheld by the state's supreme court.

Mr. Justice BLACK, speaking for the United States Supreme Court, reversed, holding that the procedure was a violation of the due process clause of the Fourteenth Amendment. " . . . our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome." The Court pointed out that it is extremely difficult for the judge to free himself from the influence of what took place in the "grand jury" secret session and that the judge, who was probably the person most familiar with what took place in the "grand jury" session, could not be effectively cross-examined at the contempt trial.

Mr. Justice REED, joined by Mr. JUSTICE MINTON and Mr. Justice BURTON, dissented in an opinion that argued that this case was no different from the ordinary case of judicial trial for contempt committed in open court and that there was no indication of any prejudice or unfairness on the part of the judge in this case.

The case was argued by William L. Colden for petitioners and by Edmund E. Shepherd for respondent.

Criminal Law . . . *the Mann Act*

■ *Bell* v. *United States,* 349 U. S. 81, 99 L. ed. (Advance p. 515), 75 S. Ct. 620, 23 U. S. Law Week 4198. (No. 468, decided May 9, 1955.) *Judgment of the Court of Appeals for the Sixth Circuit reversed.*

Petitioner pleaded guilty to two counts charging him with violation of the Mann Act. Concededly he had transported two women across a state border on the same trip and in the same vehicle. The question was whether this constituted one offense or two.

Speaking for the Supreme Court, Mr. Justice FRANKFURTER reversed the Circuit Court which had affirmed the District Court's holding that two separate offenses had been committed. The Court conceded that Congress could have made simultaneous transportation of more than one woman liable to cumulative punishment, but since the language of the statute was not clear on the point, the Court held that the ambiguity should be resolved in favor of lenity.

Mr. Justice MINTON, joined by the CHIEF JUSTICE and Mr. Justice REED, wrote a dissenting opinion which argued that there was no ambiguity in the statute. Congress had intended to stamp out degradation and debauchery of women by punishing those who used them for prostitution, the dissent declared. "Surely it did not intend to make it easier if one transported females by the bus load."

The case was argued by James R. Browning for petitioner and by Charles F. Barber for respondent.

How To Make an Incomparable Gift

■ In 1945, The Eye-Bank for Sight Restoration, Inc., was incorporated. One of its major purposes is the education of the public throughout the country as to the desirability of donating eyes at death so that many persons, who might otherwise remain blind for life, may be made to see again—through the dramatic corneal grafting operation. This involves transplantation of cornea, or surface tissue, of a donated eye to a person whose own cornea is damaged or scarred. Where conditions are favorable, this operation today gives excellent results in over 90 per cent of the cases handled.

It is a major misfortune that the Eye-Bank loses a great many eyes intended for its work because the generous donors have mistakenly believed that the gift of their eyes should be covered merely by an appropriate provision in their wills.

Many careful lawyers from time to time telephone or write to the Eye-Bank asking the correct procedure. This is welcomed and someone is available in the Eye-Bank office to answer such questions at all reasonable hours. Briefly, the important thing is that the donor should execute and deliver to his next-of-kin or to the person who would have charge of his burial arrangements a written statement that he wishes to donate his eyes for such uses as the Eye-Bank may see fit.

Any lawyers who have clients wishing to make this incomparable gift to some unfortunate person should get in touch with the Eye-Bank. That organization will be most happy to send them a copy of the booklet entitled "A Gift Like the Gifts of God", as well as an appropriate form to be executed by their clients. The address: The Eye-Bank for Sight Restoration, Inc., 210 East 64th Street, New York 21, N. Y.

Anything you can do to spread correct information about the Eye-Bank among the lawyers of this country will be a real service to the many thousands of persons, now blind, to whom it would be possible to restore sight were the necessary corneal material available.

EDWARD E. WATTS, JR.
New York, New York

What's New in the Law

The current product of courts, departments and agencies

George Rossman • EDITOR-IN-CHARGE
Richard B. Allen • ASSISTANT

Attorneys . . . *admission to the Bar*

▪ Derogatory information, neither the semblance nor source of which is revealed, cannot be used by the Florida State Board of Law Examiners to deny an applicant the right to take the bar examination preliminary to admission to the Bar. This is the ruling of the Supreme Court of Florida in a case in which the record against the applicant was made entirely by "faceless informers".

The lawyer involved was admitted in Ohio and sought licensing in Florida. In two appearances before the Board he was asked a wide-ranging series of questions about, among other things, his income, income taxes and his business transactions and associates. He was also asked whether he had served illegitimately as a tax front for some business associates.

The Board did not at any time indicate what acts had been reported to it or by whom they had been reported. The applicant denied all the derogatory allusions and allegations. The Board informed him that he did not meet the standards for admission, but advised him that, in accordance with the Board's administrative rules, he could have a rehearing by producing "new and additional matter which had not been previously considered". The applicant protested that this procedure denied him due process of law, because he had not been confronted with or apprised of the complaints and could not therefore know what to produce to counteract them.

The Court agreed with the attorney, quashed the Board's order and directed it to accord a new hearing. Basing its decision on general principles of administrative law, the Court said that "an administrative body, no matter how broad its discretion, must show, when its orders are properly challenged in the courts, that its conclusions are based upon record evidence and do not rest solely upon confidential information of which the applicant is not apprised and as to which the administrative body gives such credence as to permit it to override a complete denial of derogatory implications by an applicant when he is questioned."

The Court rejected the Board's theory that the Florida statute gave it the unfettered right to reject an application on the basis of undisclosed information procured by private investigations or secret means.

(*Coleman* v. *Watts et al.*, Sup. Ct. Fla., May 11, 1955, Sebring, J.)

Attorneys . . . *disbarment charges*

▪ With two judges dissenting, and one concurring on other grounds, the Supreme Court of New Jersey has ruled that the filing of charges against an attorney with an ethics and grievance committee is privileged and that no subsequent action lies in favor of the attorney for malicious prosecution.

Actually no definitive decision on the merits was ever reached in the disciplinary action. After receiving the charges, the county ethics and grievance committee, in accordance with New Jersey practice, filed a complaint. The attorney answered, a hearing was held and the committee prepared a presentment charging unethical and unprofessional conduct.

When this came before the Supreme Court, however, the Court discharged an order to show cause on the ground that the attorney was acting as a real estate broker rather than as an attorney when the alleged unethical conduct occurred. It was then that the attorney commenced his malicious prosecution action against the committee's informer.

In affirming dismissal of the suit, the Court declared that the case was one of balancing conflicting public policies. On one hand, the Court noted, is the injury resulting to the attorney from baseless charges; on the other, the public interest to encourage those having knowledge of unethical conduct to present it to the appropriate ethics and grievance committee. The Court concluded that the overriding public policy required the filing of a grievance complaint to be privileged.

"If each person who files a complaint . . . may be subject to a malicious prosecution action by the accused attorney," the Court remarked, "there is no question but that the effect in many instances would be the suppression of legitimate charges against attorneys who have been guilty of unethical conduct, a result clearly not in the public interest."

The judge who concurred in a separate opinion felt that the privilege point was not well-taken. Pointing out that the charges against the attorney had been proved before the committee and not ruled on by the Court, he said the complaint should be dismissed because the plaintiff could not prove the defendant's lack of probable cause—an essential element of malicious prosecution.

The two dissenters also criticized the privilege ruling. They said the complaint should not be dismissed, but the attorney should be allowed at least to attempt his proof.

(*Toft* v. *Ketchum*, Sup. Ct. N. J.,

Editor's Note: Virtually all the material mentioned in the above digests appears in the publications of the West publishing Company or in The United States Law Week.

May 2, 1955, Vanderbilt, C. J., 113 A. 2d 671.)

Constitutional Law . . . *church and state*

■ A statute providing state aid to charitable hospitals to further nursing education is not a violation of the constitutional doctrine of separation of church and state because under it aid may be made available to hospitals operated by religious denominations, according to an Opinion of the Justices of the Supreme Court of New Hampshire.

An 1877 amendment to New Hampshire's Constitution states that "no money raised by taxation shall ever be granted or applied for the use of the schools or institutions of any religious sect or denomination". The Court pointed out, however, that the Constitution, in a provision of longer standing, guaranteed that "no subject shall be hurt . . . for his religious . . . persuasion".

Putting the two provisions together, the Court said: "What was intended to be forbidden by the amendment of 1877 was support of a particular sect or denomination by the state, at the expense of taxpayers of other denominations or of no denomination. It was not intended that members of a denomination should be deprived of public benefits because of their beliefs."

The Court emphasized that the object of the bill was to provide urgently needed nursing education and not to aid any particular sect or denomination. Since the aid would be granted to all hospitals that qualified, the aid was devoid of sectarian doctrine and purposes, and the hospitals became conduits to accomplish a public objective. The Court concluded there was nothing unconstitutional about this.

(*Opinion of the Justices,* Sup. Ct. N. H., April 6, 1955, 113 A. 2d 114.)

Constitutional Law . . . *right to silence*

■ Considerable doubt may have been thrown on current efforts to disbar lawyers for failing to answer Communist-questions by an Opinion of the Justices of the Supreme Judicial Court of Massachusetts. The Court has ruled that the right of an individual to engage in a lawful occupation is a right secured by the federal and state constitutions and, while it is subject to reasonable regulation, it cannot be destroyed.

The proposed statute presented to the Court for opinion provided for the automatic discharge of any teacher, in either a public or private institution, who refused "for any reason whatsoever . . . to answer questions pertinent to his past or present membership in the Communist Party. . . ."

Since it plainly applied to a person who might exercise his privilege against self-incrimination, the Court ruled that the statute would be unconstitutional even though it did not prevent the person from using his privilege, but provided for discharge if he did. The effect of the statute, the Court said, would be "comparable" to a direct suppression of the privilege—a "hardly less serious attack upon the constitutional right".

The Court observed that if the present statute were constitutional, then it would be equally constitutional to prohibit a lawyer from practicing on the same ground. Quoting the Supreme Court in *Frost* v. *Railroad Commission,* 271 U.S. 583, the Court said: "It is inconceivable that guaranties imbedded in the Constitution of the United States may thus be manipulated out of existence."

(*Opinion of the Justices,* Sup. Jud. Ct. Mass., April 13, 1955, 126 N.E. 2d 100.)

Courts . . . *the Wanamaker case*

■ An Ohio Court of Common Pleas judge, Walter B. Wanamaker, is succeeding in his fight with the Supreme Court of Ohio to establish the principle that suits may be filed in courts as a matter of right, and not as a matter of dispensation by the particular court.

The lengthy and involute litigation was triggered by a *per curiam* statement of the Ohio Supreme Court in *Ohio* v. *Hashmall,* 160 Ohio St. 565, 117 N.E. 2d 606, that Judge Wanamaker had imposed two sentences consecutively rather than concurrently because he had been advised that the defendant was a Communist. Criticizing the sentencing, the Court remarked that even "a Communist is entitled to even-handed justice in our courts".

Judge Wanamaker, pointing out that in twenty-three years as a trial judge he had always (except in two instances) sentenced consecutively when a jury had convicted on multiple counts, wrote each member of the Court asking for a retraction. When he got no replies, he filed an application in the Court to expunge the remarks. [For a more complete explanation of the background, see 41 A.B.A.J. 165; February, 1955.]

Then the real trouble began. Judge Wanamaker attempted to file in the Court an affidavit for the purpose of disqualifying the sitting justices of the Court from passing on his application to expunge. The disqualification proceeding was predicated on a provision of the Ohio Constitution.

But the clerk refused to file the affidavit of disqualification, whereupon Judge Wanamaker sought a writ of mandamus against the clerk. The Court retaliated by striking his application to expunge. Judge Wanamaker then commenced a prohibition action against the members of the Court.

An intermediate Ohio Court of Appeals denied both writs of mandamus and prohibition on the ground that an inferior court could not issue them against a superior court or an arm (clerk) of a superior court.

Then Judge Wanamaker began a series of attempts to get a hearing in the Ohio Supreme Court, before replacement judges, of the various actions. This he finally obtained on May 11. "Showing little confidence in the fifth promise of a hearing on May 11", he comments, "after fourteen months of maneuver and counter-maneuver, I filed in the United States Supreme Court a motion for

extraordinary writ of mandamus [Misc. No. 642] to compel the Ohio Supreme Court to give me a hearing. Service on the judges of the Court as defendants was received by them May 5."

By the time the May 11 hearing was reached, the voters had taken care of the disqualification of two justices; they were defeated for re-election last year. On May 4 Judge Wanamaker had been advised by the clerk that "although not required by law to do so" the remaining five regular members of the Court had "voluntarily withdrawn" and that five intermediate appellate judges had been assigned to the Supreme Court for the Wanamaker cases. Thus at the May 11 hearing there was an entirely new Supreme Court.

In these circumstances, counsel for the regular justices contended that Judge Wanamaker's affidavit of disqualification was moot, and that the replacement judges should proceed to hear the application to expunge. But it's not that simple, Judge Wanamaker replied. He argued that he was entitled to a clear ruling as to whether an affidavit of disqualification, and the other actions, could be filed under constitutional provisions, and whether the affidavit had been effective. The acting chief justice then signed the order calling in replacement judges and ruled orally from the bench that the affidavit be filed, thus acknowledging disqualification of the regular judges.

The replacement Court reserved rulings and will announce its decision with opinion later. The opinion will be delayed because three of the replacement judges are involved in appellate review of the Sheppard murder case.

Actually five members of the old Supreme Court made a left-handed apology to Judge Wanamaker in a concurring opinion in *State* v. *Lawrence*, 162 Ohio St. 412, 123 N.E. 2d 271, where, in criticizing a trial judge's conduct, it was said: "What is said herein, or what may have been said inadvertently in any previous opinion of this court, is not to be construed [as impugning] the motives or integrity of the trial judge. ..." Chief Justice Weygandt and Justice Hart did not, however, join in this concurring opinion.

Commenting on the cases, Judge Wanamaker says: "Thus was established in Ohio the right of a citizen to disqualify judges, even of the court of last resort, if a claim of bias and prejudice is made against any of its members. It might be interesting to have a survey of the condition in the several states as to the existence of the right of disqualification of judges of the court of last resort. It might well be that this principle will spread to them."

(*Ohio ex rel. Wanamaker* v. *Weygandt et al.*, Sup. Ct. Ohio. Above material prepared from transcript of hearing before the Court on May 11, 1955.)

Evidence . . . *obtained illegally*

■ With three judges dissenting, the Supreme Court of California has abandoned the majority rule that evidence, no matter how illegally obtained, is admissible against a criminal defendant, and has adopted the minority, but also federal, doctrine that such evidence must be excluded.

The evidence, presented in a prosecution for bookmaking, had been obtained in what the Court called "flagrant violation" of both federal and state constitutional guarantees against unlawful search and seizure. But this circumstance would not have dictated its exclusion in most American courts. The reasoning is that the method of obtaining evidence does not affect its trustworthiness, and that exclusion too often results in a criminal needlessly escaping justice.

In *Weeks* v. *U.S.*, 232 U.S. 383, the Supreme Court formulated the federal exclusionary rule where evidence is obtained in violation of the Fourth Amendment. In *Wolf* v. *Colorado*, 338 U.S. 25, the Court held that Fourth Amendment rights applied also to the states through the vehicle of the Fourteenth Amendment, but that the exclusionary rule was not an "essential ingredient" of but only a means of enforcing those rights, and that the states could therefore accept or reject it. Finally, Justice Jackson, writing for the Court recently in *Irvine* v. *California*, 347 U.S. 128, observed that in view of the *Wolf* doctrine the states "may wish further to reconsider their evidentiary rules".

And reconsider the California Court did. In a careful opinion setting out the supporting rationales of the two doctrines, the Court specifically overturned its former rule. It conceded that the exclusion rule would not prevent all illegal searches and seizures, but it felt that it would discourage them. The controlling consideration was the Court's feeling that the state, through its judiciary, was condoning and enhancing an illegal act in admitting illegally obtained evidence. The Court declared:

> It is morally incongruous for the state to flout constitutional rights and at the same time demand that its citizens observe the law. The end that the state seeks may be a laudable one, but it no more justifies unlawful acts than a laudable end justifies unlawful action by any member of the public. Moreover, any process of law that sanctions the imposition of penalties upon an individual through the use of the fruits of official lawlessness tends to the destruction of the whole system of restraints on the exercise of the public force that are inherent in the "concept of ordered liberty."

The dissenters argued that the Court should not change the state's long-standing law. They stated that it would be better for the state to retain the non-exclusionary doctrine and discourage illegal police practices through sanctions such as the imposition of civil liability on the governmental unit employing the offending officer, with a minimum damage recovery.

(*California* v. *Cahan*, Sup. Ct. Calif., April 27, 1955, Traynor, J., 282 P. 2d 905.)

Evidence . . . *privilege*

■ A criminal defendant waives his privilege against self-incrimination

by taking the witness stand in his own behalf, but he does not waive his privilege against revealing communications between himself and his attorney. This is the decision of the New York Court of Appeals in a case where the point arose under unusual factual conditions.

The defendant was tried and convicted for robbery; it was alleged that he was in and ready to drive the get-away car when his accomplices came out of the store where the robbery had occurred and walked into the arms of some waiting policemen. The defendant's story was that he was simply waiting in the car to pick up his girl friend Doris for a double date with one of the accomplices. Unfortunately, he said, he couldn't remember Doris's last name or address.

At the trial, the defendant took the stand, and when it appeared that Doris wasn't going to appear, the prosecution asked him whether he had ever discussed Doris with his attorney or told the attorney her name or whereabouts. Over defense objections, the trial judge ordered the defendant to answer.

Faced with this dilemma, the defense counsel, with the aid of the prosecution, produced Doris. Her story was so at variance with the defendant's that his defense collapsed.

With two judges dissenting, the Court ruled that by taking the stand the defendant had not waived the rules governing competency and admission of evidence. The Court declared that the trial judge had breached the attorney-client privilege by ordering the question answered, and that this error was substantial since it had resulted in the defense being demolished.

(*New York* v. *Shapiro*, N.Y.C.A. April 28, 1955, Dye, J., 126 N.E. 2d 559.)

Juries . . .
insurance advertising

■ Two more attempts to halt insurance-company advertising advising a go-easy attitude on damage awards have misfired. The advertisements, some of which appeared in *Life* and the *Saturday Evening Post*, emphasized that excessive jury awards against insured defendants resulted in higher insurance rates. They advised the reader that when he sat as a juror to "be fair with the public's—and your—money".

In a California case the action was for a writ of *quo warranto*, seeking a restraint against further publications and a forfeiture of the defendants' corporate rights in the state. The petition contended that the publications were a contempt of the judicial process and a conspiracy formed with intent to corrupt jurors.

But the District Court of Appeal for the Second District ruled that the advertisements posed no "clear and present danger" and that they were protected by constitutional guarantees of freedom of press and speech. While these freedoms are not limitless, the Court declared, they cannot be curtailed unless the substantive evil threatening the administration of justice is imminent and extremely high.

The Court ruled, moreover, that the relief sought amounted to a prior restraint on publication and that *quo warranto* could not be used "to effect restraint upon publication —which is the essence of censorship."

(*California ex rel. Barton* v. *American Automobile Insurance Company et al.*, Calif. Dist. Ct. App., 2d Dist., April 18, 1955, White, J., 282 P. 2d 559.)

■ In the other case, in a federal district court in Pennsylvania, the plaintiffs in an automobile accident case sought a contempt citation against the same insurance companies, who were not parties to the original suit. The plaintiffs' motion requested that the companies be restrained perpetually from publishing the advertisements.

The district judge, dismissing the motion, held that "the out-of-court publication of these advertisements . . . [does] not interfere with the ordinary administration of justice in the action before this court [and] there is not present that extremely high degree of imminence of the substantive evil which would justify punishment of the publications".

The Court of Appeals for the Third Circuit affirmed on the ground that the contempt alleged was, if anything, a criminal contempt, and that under 18 U.S.C.A. §3731 only the United States or someone on its behalf could appeal from the dismissal of a motion for a criminal contempt citation.

But even if the district court's action were appealable, the Court observed, the publications could not be punished in view of the "clear and present danger" doctrine.

(*Hoffman* v. *Perrucci*, C.A. 3d, May 12, 1955, McLaughlin, J.)

Schools . . .
segregation and bonds

■ A Virginia circuit judge has added a new twist to the case-law aftermath of the Supreme Court's ruling in the School Segregation Cases, 347 U.S. 483. He has enjoined a school board from issuing bonds voted before the Supreme Court's decision because only non-segregated public schools can now be built, whereas the voters had approved the bonds when the state's constitution required separate facilities.

The case arose in Virginia's Fifteenth Circuit in Hanover County. When the bonds were electorally approved on July 14, 1953, Virginia's constitutional provision that "white and colored children shall not be taught in the same school" had not been annulled by the Supreme Court's pronouncement.

Now, the Court declared, "if the state continues the public school system, it is inevitable that its public schools must be operated on a non-segregated basis". This change in conditions is so vast, the Court held, that it would be illegal to make any expenditures from the bond issue.

The Court seized the occasion to criticize the Supreme Court's decision as "a purely political opinion based on certain psychology books", and said "we are for the first time in American judicial history presented with an opinion which overruled well-considered and rightly-considered opinions by some of the great-

est American judges, on the authority of the unestablished opinion of certain psychologists." The Court averred, moreover, that the Supreme Court's real purpose was the complete socialization of the races.

(*Shelton* v. *County School Board*, Va. Cir. Ct., 15th Cir., June 2, 1955, Bazile, J., not reported but excerpts printed in *New York Times*, June 3, 1955.)

Taxation . . .
interstate commerce

▪ Michigan may levy a sales tax on sales aboard a Great Lakes steamer plying between several states, and even crossing into Canadian waters during a trip, according to the Supreme Court of Michigan. The imposition of the tax on that part of the sales reasonably assumed to have occurred in Michigan waters does not violate the Constitution's commerce clause, the Court held.

The apportionment formula used by the state was based on the percentage of each trip a steamer was in Michigan waters, which percentage was then applied to the gross receipts of the company for sales of food, novelties and liquor. The resulting figure was subjected to the state's sales tax. The steamer company contended, however, that all trips were made in interstate or foreign commerce and that the tax, even though apportioned, was prohibited by the commerce clause.

The Court said the primary consideration was the relationship of the transaction taxed to interstate commerce. Here, the Court continued, even though the vessel was traveling in interstate commerce, the sales were "local" activity, apart from the transportation of passengers, and both buyer and seller were in the same jurisdiction. The Court further found that the apportionment formula was reasonable, non-discriminatory and designed to preclude the imposition of multiple tax burdens on the steamer company.

(*Detroit and Cleveland Navigation Company* v. *Michigan Department of Revenue*, Sup. Ct. Mich., April 14, 1955, Butzel, J., 69 N.W. 2d 832.)

Torts . . .
right of privacy

▪ Remember Al Ettore? In 1936 he failed to wrest the heavyweight title from Joe Louis. And in 1954 in *Ettore* v. *Philco Television Broadcasting Corporation*, 126 F. Supp. 143 (41 A.B.A.J. 556; June, 1955), he failed in a right-of-privacy action predicated on the television showing of films of the fight without his permission.

Dealing with a somewhat similar factual situation, the United States District Court for the District of Columbia has ruled out an action for invasion of the right of privacy brought by a rehabilitated former inmate of a penal institution whose fight for vindication of his wrongful conviction was televised on "The Big Story".

The plaintiff was convicted of murder in 1933 and sentenced to death. This sentence was commuted to life imprisonment in 1935. He was released conditionally in 1940 and received a presidential pardon in 1945. Considerable publicity accompanied these events. Since his release from prison he had lived an exemplary life.

The plaintiff's vindication resulted in large measure from the efforts of a woman reporter for the *Washington Daily News*, whose "big story" it was that was televised. In 1936 or 1937, however, a detective story magazine had published a story on the case, and in 1948 the reporter's story, quite similar to the telecast, had been used on the radio version of "The Big Story". The plaintiff made no objection to this.

In his present action he contended that he had dropped out of the public eye in 1940, and that he was held up to calumny as a result of having his unsavory past revealed. Although his real name was not used in the TV play, he claimed that the actor who portrayed him looked as he did in 1933.

But the Court held that the protection that the passage of time may bring to a former public figure is not against repetition of facts which are already public property and might be read in any newspaper file, but against unreasonable identification of him in his present setting with the earlier incident. Since the plaintiff's identity and present status were not revealed, the Court concluded that he was not protected by time.

Determining a point not authoritatively settled, the Court ruled that a common-law right-of-privacy action existed in the District of Columbia, but that the facts gave the plaintiff no basis for the action because the story of his crime-life was not a private affair in which the public had no legitimate concern—a necessary ingredient of the action under common law.

Referring to the deviations from fact in the TV version of the trial, the Court observed:

> If anyone's sensibilities should have been wounded by the play, it was the judge, the detectives and the trial counsel, whose parts were given such unsympathetic treatment as to be defamatory, had there been identification. The whole atmosphere of the trial, as portrayed in the telecast, was not such as to inspire viewers with confidence in the administration of justice in the District of Columbia.

(*Bernstein* v. *National Broadcasting Company*, U.S. D.C. D.C., March 17, 1955, Keech, J., 129 F. Supp. 817.)

Trials . . .
right to transcript

▪ A New York court has denied a newspaper the right to compel a court reporter to furnish it with a copy of the judge's jury charge in a criminal case.

The *New York Post*, proceeding by mandamus, sought an order against the reporter and judge requiring the former to deliver it a copy of the charge and the latter either to direct the stenographer to comply or to refrain from forbidding him to do so. The newspaper offered to pay for the transcript but neither the stenographer nor judge budged.

Referring to the New York Court of Appeals' recent ruling concerning press coverage of the *Jelke* case

[*United Press Associations* v. *Valente*, 123 N.E. 2d 77 (41 A.B.A.J. 361; April, 1955)], the Supreme Court of Kings County held that the fact that the petitioner was a newspaper gave it no special right or privilege not possessed by an ordinary citizen and concluded that New York statutes did not accord to the general public the right to demand a trial transcript.

The Court declared that the reporter's notes were not public records in the same sense that land records, for example, are public records, and that they could be demanded only in accordance with a statute providing for the furnishing of a transcript to "any party to the action requiring the same". Said the Court: "To require a stenographer to furnish minutes to anyone requesting it would interfere with the orderly function of the court."

(New York Post Corporation v. *Leibowitz,* N.Y. S.Ct. Kings Co., May 31, 1955, DiGiovanna, J.)

Unfair Competition . . . *phonograph records*

■ In the Court of Appeals for the Second Circuit, Capitol Records has won its battle against Mercury Records for the exclusive United States rights to German Telefunken masters.

There was no copyright question in the case since the compositions were in the public domain. The uniqueness of the virtuoso performances contained on the records was the important right between the parties.

Capitol claimed its right through contract with Telefunken to use the masters and sell records in the United States. Mercury claimed its right from an alien property administration in Czechoslovakia, but the original assignment by Telefunken to the Czech company had not included the United States.

The Court first determined that phonograph-record performances are not copyrightable under present law, and, with Judge Learned Hand dissenting, that therefore the law of New York, rather than federal law, applied. The Court further ruled that Capitol's title to the masters was superior to Mercury's.

But Mercury claimed that since only the common-law right to literary property was involved, Capitol had lost that right upon publication, and that consequently after the records were first issued, Mercury had the right to sell records from its masters or to copy the Capitol records.

The Court ruled, however, that the New York law, as declared in *Metropolitan Opera Association* v. *Wagner-Nichols Recorder Corporation,* 199 Misc. 786, 279 App.Div. 632, was clear that "where the originator . . . of records of performances by musical artists puts those records on public sale, his act does not constitute a dedication of the right to copy and sell the records".

(Capitol Records, Inc. v. *Mercury Records Corporation,* C.A. 2d, April 12, 1955, Dimock, J., 221 F. 2d 657.)

■ In another phonograph-record case in the Court of Appeals for the Second Circuit, this one involving copyright, the proprietor of the copyright of "In the Good Old Summertime" has failed in an attempt to prevent a record company from issuing and selling recordings of the tune.

The song was originally copyrighted in 1902. Renewal copyrights were obtained as to the lyric in 1929 and on the music in 1930. Prior to 1909, mechanical reproduction of copyrighted compositions was in the public domain and hence unauthorized mechanical reproduction on phonograph records was permissible, under the Supreme Court's decision in *White Smith Music Publishing Company* v. *Appollo Company,* 209 U.S. 1.

To overcome this decision, Congress amended the law in 1909 to protect a copyrighted work against mechanical reproduction, but specifically limited the protection to compositions published and copyrighted after July 1, 1909.

The Court held that a renewal copyright does not create a new grant, and that because "In the Good Old Summertime" had been copyrighted in 1902 it did not fall within the scope of the 1909 amendment.

(Edward B. Marks Music Corporation v. *Continental Record Company, Inc.,* C.A. 2d, April 13, 1955, Hincks, J.)

What's Happened Since . . .

■ On May 23, 1955, the Supreme Court of the United States:

DENIED CERTIORARI in *Wood* v. *O'Grady,* 122 N.E. 2d 386 (digested in 41 A.B.A.J. 74; January, 1955), leaving in effect the decision of the New York Court of Appeals that under New York law an injunction could not be issued to enjoin a union from peaceful picketing of a liquor store in an effort to organize sales clerks. [For decision below in New York, see 283 App.Div. 83 (digested in 40 A.B.A.J. 233; March, 1954).]

REVERSED [6-to-2, with opinion by MR. JUSTICE CLARK] the decision of the Court of Appeals for the Second Circuit in *U.S. ex rel. Accardi* v. *Shaughnessy,* 219 F. 2d 77 (digested in 41 A.B.A.J. 357; April, 1955), that the Board of Immigration Appeals was influenced unconsciously and adversely toward an applicant for suspension of a deportation order because his name appeared on a supposed list of "unsavory characters" prepared by the Attorney General, and because of press circulation given to statements by the Attorney General about his "deportation program". The Supreme Court agreed with the district court that Accardi had failed to prove even the existence of the "list", and that the statements of the Board members that they knew of no "list" and had not been approached nor influenced by the Attorney General in deciding the case should be given credence.

Department of Legislation

Charles B. Nutting, Editor-in-Charge

Law schools are becoming increasingly aware of the importance of legislation and of their obligations in connection with the study and preparation of legislative material. The work of the legislative research center at the University of Michigan is particularly significant in this connection. It is described in the following article by Samuel D. Estep, Director of the Center and Professor of Law in the University.

The Michigan Legislative Research Center

by Samuel D. Estep

Dean E. Blythe Stason created the Legislative Research Center at the University of Michigan Law School because he believes that statutory law is destined to become, if it is not already, the most important part of the corpus juris of this country. Law schools, using Ames' case method, commercial publishers with their annotations, digests and key systems, and legal scholars through treatises, have equipped the American lawyer to handle rather effectively our judge-made or case law. However, the schools, publishers and writers have as yet offered no equivalent techniques for handling statutory materials, even though it has been obvious for at least a score of years that statutes and regulations interpreting them were becoming the most important part of our law. The purpose of the Legislative Research Center is to attack this problem. Can we develop a counterpart of the "case method" for teaching statutory materials? Can we discover a method by which these statutes can be collected, keyed, and digested for the use of all lawyers?

After a careful investigation by Professor L. Hart Wright and myself of existing services and facilities handling statutory materials, Dean Stason decided to establish the Legislative Research Center in the fall of 1950. Financed partly by general University funds and with generous support from the William W. Cook Endowment Fund for Legal Research, a full-time staff was hired. It now consists of Associate Director William J. Pierce, Research Associate David L. Howe and several recent law graduates, new each year. Just this year we have decided to invite applications from graduates of other law schools who are interested in combining graduate law work with employment in the field of legislation. Our thought is that over a period of years we can attract high-caliber law graduates who will get a thorough training in handling legislation and be better prepared to enter private practice, the teaching profession, or government service (particularly for legislative service agencies) and perform more effectively because they have had a year of post-graduate training under close supervision. If nothing else, a year of closely supervised research and writing should greatly supplement the legal skills acquired in the ordinary three-year law school course. We also felt that with such a full-time staff we could at least make a start toward promoting teaching, research, and service in "written law".

Current Trends Volumes

Late in 1952 the first tangible evidence of our efforts was published, *Current Trends in State Legislation —1952*. Early in 1955 the second *Current Trends* volume will be ready for distribution. A third should be ready in late 1955. These are the first of a continuing series of volumes for which, over a period of years, we have great expectations.

The purpose of these volumes was stated in the preface to the first volume. We are trying "to fill, even though only in small part, the vast void in our legal literature on state statutory enactments. We realize that, even if we are successful in our efforts, we truly are filling only a small part of the void, for these volumes, at least in the beginning, will only deal with state statutes and even then only with what we like to think of as private law statutes.

"One result of our investigations was a firm conviction that the lack of legal literature, particularly of an objective and scholarly nature, was most acute in the field of state statutes dealing with the legal rights and relations primarily between individuals as contrasted with those dealing with the relations between government and individual. Labor legislation does not go undiscussed even in legal journals for there are strong pressure groups affected and much general interest is generated; statutory regulation of trade and commerce such as found in anti-trust laws nearly always finds proponents and opponents who will fully discuss its scope and merits; tax statutes, highway programs, criminal laws, social welfare legislation all have their interested and articulate groups either within government agencies or among organized non-governmental groups. . . . We found nothing like a *systematic* collection, let alone *discussion*, of important recent state statutes which govern a person's rights to sue a radio station for defamation, the right of notice of court actions, the right to introduce photographic copies as evidence, or the rights of a mortgagee for future advances. . . .

"[W]e firmly feel that there is a vast field of state statutory enactment which is of real importance to the individual members of our states and to the lawyers and legislators who represent them and yet which is not adequately discussed. Actually even our law schools do not take sufficient cognizance of them in their instruction of law students. Yet for the vast majority of the practicing Bar, other than the big corporate and government attorneys, this law is more important than any other. With these

volumes we are hoping to meet at least part of what we think is a vital need. We are steering a largely uncharted course, but we are certain that if we are to have good statutes governing the relations between individuals in our society we must begin to discuss critically such legislation."

While the great bulk of statutes passed by state legislatures in a given year deals with what might be called public law problems, the number passed in the private law area in the forty-eight states is still large. Of these we only deal with those recently enacted which seem to have significance to legislators and lawyers throughout at least a considerable part of the United States. The statutes discussed, therefore, concern problems common to many states and incorporate some new concept such as a new solution for an old problem or application of an old concept to a new problem. We found that the number of such "significant" statutes enacted in the forty-eight states is exceedingly small. We were even so bold in our first volume as to assert, rather timorously, that we had included all such statutes adopted in the forty-eight states in three years. The small number of such significant statutes continues to amaze us.

In choosing which of the many statutes enacted are worthy of detailed analysis one of the staff makes a preliminary investigation of any statute that on first reading *might* warrant consideration. The staff member looks to both statutory and case background in the jurisdiction which adopted the statute and also checks other states for similar enactments. Where the subject falls within the field of specialization of a member of the law school faculty, that faculty member is consulted to determine whether the statute is worthy of inclusion. In this way we hope to avoid those with little or only local significance and at the same time inform our legislators and lawyers of those worthy of real consideration.

A list of monographs included in the first two volumes fairly indicates the kind of thing we are doing: "Recent Legislative Trends in Defamation by Radio"; "The Mullane Doctrine—A Reappraisal of Statutory Notice Requirements"; "Right of Dissenting Shareholder to Appraisal"; "Reciprocal Support Legislation"; "Administrative Enforcement of Civil Rights"; "Photographic Copies as Evidence"; "Recent Legislation Affecting the Place of Trial, Forum Non Conveniens"; "Security for Expenses in Stockholders' Derivative Actions"; "Priority Position of Mortgagees for Optional Future Advances—Recent Legislative Trends"; "New Jersey's Statutory Trust Deposit"; "Recent Legislation Designed to Eliminate Double Liability"; "Weather Modification and State Policy"; "The Unsatisfied Judgment Fund and the Irresponsible Motorist"; "Legislative Modifications in Illinois of the Rule Against Perpetuities"; "Recent Legislation Affecting the Defendant's Appearance in Court"; "Oil and Gas Leases Affected by Accretion"; "Priority of Liens Against Real Property"; "Forfeitures in Land Contracts"; "The Mortgagee's Interest in Rents and Profits"; "Limitations Upon Possibilities of Reverter and Rights of Entry".

Constitutional Studies

While most of our effort during this four-year period has been directed to the preparation of the Current Trends volumes we also have in preparation a detailed study on state constitutional provisions dealing with uniformity and equality in taxation. We hope to undertake other studies so that when states desire to revise their constitutions they can have readily available scholarly studies of at least the major provisions they will consider.

Federal Statutes

Eventually we hope to expand our efforts to include studies of important federal statutes, particularly with respect to the legislative history of such enactments. Even during this organization period, through the financial support of the University's Phoenix Project, Dean Stason, Professor Pierce and I have undertaken the preparation of a volume on the legislative history and legal problems of the Atomic Energy Acts of 1946 and 1954. We plan to supplement this with a volume on tort liability, state health and safety regulation problems, the impact of the Public Utility Holding Company Act and the development of a private industry in peaceful uses of atomic energy. In the future we hope to encourage and support others, both teacher and practitioner, in similar studies of other important federal and state statutes in the public law area.

Service Work

Because of our severe staff and financial limitations we have not been able to do all of the direct service work that we would like and have been asked to do by various outside groups, both government and private. We hope eventually to be equipped to handle a substantial number of requests from such groups as the Council of State Governments, American Bar Association, National Conference of Commissioners on Uniform State Laws, etc., when they have problems of genuine contemporary nation-wide interest. Careful and objective service of this kind should make a real contribution to the growth of statute law in this country.

In spite of our limitations during these early years we have been able to make several significant contributions. Most of these have been done either for government agencies of the State of Michigan (such as assistance in preparation of a Pharmacy Code) or for Dean Stason or Professor Pierce in connection with their work as Uniform Commissioners. One service project, however, involved a federal problem. Our staff gave considerable assistance to the American Bar Association's Special Committee on Atomic Energy in connection with its recommendations made to the Joint Committee on Atomic Energy of Congress. The rec-

ommendations of this Special Committee had a considerable impact on the provisions actually incorporated in the Atomic Energy Act of 1954.

We feel very strongly that if our statutory product is to measure up, particularly at the state level, and if busy lawyers are to counsel their clients adequately in statutory matters, much more of this kind of service work must be done.

Teaching

Our contributions to the teaching of statutory law are much less tangible than in the case of research and service. There should be some indirect benefit from the Current Trends volumes, not only by way of informing teachers of new state statutes but also in making available materials which might be starting points for seminar work. In addition, certainly the law graduates who spend a year with the Research Center have some very intensive training in handling statutes. Again, to supplement our regular course in legislation, we offer a seminar in legislative drafting, typically using some topic we are working on as the subject matter to be studied. Perhaps least tangible of all by way of contribution to teaching is a by-product of our current trends work. In looking at state statutes for possible study we can easily collect for our faculty the new state enactments adopted from year to year in the various fields of faculty interest. So far we have only called the statutes to the attention of the faculty but even this over a period of years should do much to help and encourage the faculty to include statutory materials in the typical common law courses, both in casebook and classroom materials. The impact cannot be measured but it might be great.

We still have far to go in accomplishing our goals, but we have made a start toward the creation of a real center of legislative study.

Remarks to New Citizens

As judge of this court and speaking for this country and this community, I extend to you new citizens a hearty welcome into our national family. With the taking of your oath of allegiance, you are given the same citizenship that is enjoyed by all other citizens, even those who are descendants of the founders of this nation. There are no degrees of citizenship in this country—all are equal before the law. I, therefore, extend to you the same welcome that you would extend to one of your neighbors who called at your home. Come in and be one of us!

Now, it becomes necessary for me to say a few words about the obligations of citizenship—the obligations and duties that rest upon all of us in return for the rights and privileges and benefits which we receive as citizens of this country. It is a great blessing to be a citizen of the United States. Our country is not only the greatest nation in the world today, it is the greatest nation in all the history of the world. It is the greatest not because it is the richest and the most powerful, but because it has raised the standard of living for all mankind to a higher level than ever before attained in any other time or place.

This accomplishment attests the wisdom of the men who founded this nation. It has grown and prospered and proved of benefit to all mankind because it was founded on true and just principles of government. In order to continue to enjoy the benefits of such government and be able to pass them on to our successors, we must be diligent and careful to maintain the government as it was established by its founders.

The character of our government can be best portrayed by the timeworn saying that it is a government not of men but of law. In this country the Government itself, and all departments and agencies of government, are subject to law. Our Government is founded on the will of the people, but the will of the people is expressed in the law. It is significant that you have received your citizenship in a court of law. The place of your induction was not an executive building or a legislative hall, but a court of law. Courts of law are the best representatives of the sovereignty of our nation. Since your citizenship is a grant from the sovereignty of this country, it is proper that it should be solemnized in a court of law.

In all fields of human endeavor, we prosper and progress as we learn and obey the laws of life. Men have learned to fly by observing the laws of aerodynamics. Men are kept in health and the span of life is increased by observing the laws of chemistry and the laws of hygiene; and so men are enabled to live together in peace and harmony and work together for the good of all by observing the social and political laws of their community life, and the peace and spiritual power of mankind is increased by the observance of the moral laws. This underlying principle of all life is epitomized in the scriptural saying, "If ye love me, keep my commandments."

Now, since this is a government of law, and the true sovereignty of our nation is in the law, and since the observance of the law and respect for the agencies of its administration contribute to the maintenance of that government and to the common welfare, it becomes quite clear that the chief duty and obligation of citizenship is obedience to the law and willing assistance to the maintenance and administration of the law. If, therefore, as citizens, we all keep ourselves informed as to the nature of our government and its laws, and conform our lives to the letter and the spirit of the law, we will perform our duties to the government, to one another, and conserve our own individual interests.

ROBERT N. WILKIN
United States District Court
Alexandria, Virginia

Tax Notes

■ **Prepared by Committee on Publications, Section of Taxation, John W. Ervin, Chairman; John S. Nolan, Vice Chairman.**

Divorce and Separate Maintenance Under the New Code

by Lehman C. Aarons

■ This note is limited to selected areas of current interest, with emphasis on changes made by the Internal Revenue Code of 1954.

Section 71 of the new Code repeats, with some minor changes in language and arrangement, the "alimony" provisions of Section 22 (k) of the 1939 Code and adds two new provisions.

Under Section 71 (a) (2), periodic payments made subsequent to a written separation agreement executed after August 16, 1954, may be deductible to the husband (or to the wife if she is the payor) and income to the other spouse if separate returns are filed. The 1939 Code provided for such tax treatment only with respect to payments made subsequent to a decree of divorce or separate maintenance. The new provision requires only a written agreement, and separation need no longer be pursuant to a decree.

Under Section 71 (a) (3) the same tax consequences flow if separate returns are filed by a separated couple where there has been merely a decree for support or maintenance entered after March 1, 1954. The 1939 Code required a decree of divorce or separate maintenance. Now any type of decree requiring support and maintenance payments will suffice. A previously entered support decree which is altered or amended after March 1, 1954, is apparently to be regarded as having been entered after that date. (Section 71 (a), Conference Committee Report on H.R. 8300, 83d Congress, 2d Session.)

Interlocutory Decrees

Questions concerning the effect of an interlocutory decree have been only partially settled under the 1954 Code. The *Eccles* (208 F. 2d 796, 4th Cir.) and *Evans* (211 F. 2d 378, 10th Cir.) cases, both decided in 1954, involve the effect of Utah and Colorado interlocutory decrees, respectively. In the *Eccles* case the taxpayer was seeking the right to file a joint return on the theory that the interlocutory decree did not end the marriage for tax purposes. In the *Evans* case the divorced wife was seeking to avoid payment of income tax on alimony payments on the theory that the interlocutory decree did not end the marriage of the parties for tax purposes. In each case the taxpayer succeeded. The Commissioner, however, has never acquiesced in these decisions and only within the last few months has reiterated his position that an interlocutory decree is a decree legally separating the parties and is a decree of divorce or separate maintenance under the language of the 1939 Code. (Revenue Ruling 55-178 I.R.B. 1955-13, 31.)

The continued uncertainty as to the effect of the interlocutory decree has produced a great deal of confusion in the states where interlocutory decrees are granted. In reliance on the *Eccles-Evans* cases, many claims for refunds have been filed by wives who reported post-interlocutory decree payments as income on separate returns. In reliance on these cases, likewise, many joint returns have been filed during the interlocutory period. Doubt as to the ultimate outcome of the controversy on this score has led to the insertion of complex provisions in property settlement agreements relating to the type of tax return to be filed by the parties after the interlocutory decree and relating similarly to financial adjustments between husband and wife if it should ultimately be determined that joint returns are improper, as the Commissioner contends.

Under the 1954 Code it would appear that the question is settled: if separate returns are filed, alimony is deductible to the husband and is taxable income to the wife under the usual type of interlocutory decree. If there is a property settlement agreement, these tax results would flow from subdivision (2) of Section 71 (a), so that in such a situation there need not even be a decree. Absent a property settlement agreement, the Commissioner would apparently take the position that such decrees continue to be encompassed by subdivision (1) as decrees "of divorce or of separate maintenance". If a wife objected to this, as in the *Evans* case, she would seemingly be driven to admit that on her own theory the interlocutory decree would be encompassed by subdivision (3) as being a decree providing for "support or maintenance", although falling short of being a decree of "divorce or separate maintenance".

However, the law remains unsettled with respect to the effect of an interlocutory decree upon the right to file joint returns. The Commissioner has indicated that he will continue to assess deficiencies along the lines indicated in Revenue Ruling 55-178. He will presumably continue to assert that an interlocutory decree is a decree of divorce or separate maintenance, legally separating the spouses, preventing the filing of joint returns under Section 6013 (d) of the 1954 Code. It is unfortunate that, although the air was cleared by Congress on the question of status of the interlocutory decree relative to alimony deductions, the practical and everyday issue of joint returns following an interlocutory decree was not likewise settled.

One further difficulty stemming from the status of the interlocutory decree has been in connection with installment payments of a principal sum which the parties intend as de-

ductible to the husband and taxable to the wife. Frequently such payments are provided for in property settlement agreements which are to become effective on the entry of the interlocutory decree. To be deductible under Section 71 (c), they must run for more than ten years from the date of such decree, instrument or agreement. Often, 121 months is chosen by the parties as the period for which installment payments should run. Prior to the 1954 Code, if the 121 month period was calculated by the parties as commencing with the date of the interlocutory decree, the *Eccles* and *Evans* cases posed an embarrassing problem, solved only so long as the Commissioner adheres to Revenue Ruling 55-178 in which he rejects these cases. Under the 1954 Code, it seems likely that "such decree" as used in Section 71 (c) refers back to "support" and "maintenance" decrees, as used in Section 71 (a) (3), as well as "divorce" or "separate maintenance" decrees, as used in Section 71 (a) (1). Those who wish to follow the most conservative course will provide for the continuance of installment payments for 121 months or more from the date of the final decree of divorce.

Periodic Payments

An issue which until two years ago was considered to be fairly well settled is whether payments running for a fixed period of less than ten years might still be considered "periodic payments" (deductible by the payor, and taxable to the payee spouse), rather than installment payments on a principal sum, by virtue of the contingency of remarriage or death of the wife which might terminate such payments. The Tax Court had held in a respectable line of cases that where it was necessary merely to multiply the amount of the monthly payments by the number of months over which they were payable, a principal sum was in effect specified, notwithstanding the fact that the wife's remarriage or death might shorten the period of payments and reduce the amount. *E.g.*, *F. Ellsworth Baker* v. *Commissioner*, 17 T.C. 1610 (1952), and cases therein cited. The Tax Court still adheres to this view. *Clark J. Baker and Martha B. Baker*, 23 T.C. No. 21 (1954). The only exception recognized by that Court where payments are to run for less than ten years is where the amount of each of the husband's payments is subject to computation by reference to the amount of his then current income. *Roland Keith Young*, 10 T.C. 724 (1948); *John H. Lee*, 10 T.C. 834 (1948).

But in 1933, to the surprise of many who had regarded this as a settled issue, the Court of Appeals for the Second Circuit reversed the *Ellsworth Baker* case, 205 F. 2d 369. Following this reversal, the Third, Ninth and Eighth Circuits stepped in line with the Second. *Estate of Frank Charles Smith* v. *Commissioner*, 208 F. 2d. 349 (3d Cir. 1953); *Myers* v. *Commissioner*, 212 F. 2d 448 (9th Cir. 1954); *Fidler* v. *Commissioner*,—F. 2d— (9th Cir. March 1, 1955); *Prewett* v. *Commissioner*, — F. 2d— (8th Cir. April 12, 1955). In the *Myers* case, *supra*, the Ninth Circuit went so far as to hold that periodic payments rather than a principal sum resulted, even though specified monthly payments were to continue for six years and remarriage of the wife did not terminate the husband's obligation. The mere nonspecification of the total figure was held sufficient to classify the payments as "periodic."

The 1954 Code does nothing to clarify this picture. Presumably the Commissioner will continue his efforts to convince one of the remaining Courts of Appeals of the correctness of the original line of Tax Court decisions, and thus produce a conflict for the Supreme Court to resolve.

Gift Tax

In one other area, the 1954 Code has cleared the air. It had been held in *Harris* v. *Commissioner*, 340 U.S. 106 (1950), that a property settlement did not result in a taxable gift by the transferor spouse where it was conditioned upon entry of a decree of divorce (notwithstanding the fact that by its terms, the settlement agreement was to survive any such decree). Doubt remained, however, whether slightly distinguishable agreements might receive similar favorable treatment or whether, on the other hand, they would be regarded as transfers for less than adequate consideration. Section 2516 of the 1954 Code removed these doubts by providing that any transfer under a property settlement agreement (in settlement of marital or property rights or for support of minor children) which is followed by "divorce" within two years, is deemed to be for adequate consideration. This will be true whether or not the agreement is approved by the divorce decree. Again, it would seem wise to plan the two-year period as running to the final, rather than interlocutory decree.

Deductibility of Attorney's Fees

In these tax-minded times, most attorneys must face the question, at some stage in the handling of a divorce proceeding, whether the fee will be deductible. An attorney is indeed in a fortunate position if he can answer "yes" to this question. If the attorney represents the husband, such a position will be extremely rare.

Fees paid for attorneys' services in resisting a liability in the nonbusiness area have been consistently held non-deductible, even though satisfying the liability would result in loss of income producing property, *Lykes* v. *Commissioner*, 343 U.S. 118 (1952). The one outstanding exception to this rule was *Baer* v. *Commissioner*, 196 F. 2d 646 (8th Cir. 1952) holding the husband's attorney fee deductible. There the wife had demanded so large a sum that the court was convinced that the demand directly threatened the husband's stock control over the company of which he was president, his job and salary as president, and his dividend income from the stock, *i.e.*, his capacity to earn income was directly at stake. The deduction was allowed as an expense for the production of income under what is now Section 212 of the In-

ternal Revenue Code of 1954. Although the *Baer* case has now been followed by the Court of Claims in *McMurtry* v. *United States,* June 7, 1955, 55-1 U.S.T.C. § 9497, these cases cannot yet be regarded as covering the usual situation. For the most part husbands' attorney fees in divorce negotiations and proceedings are regarded as personal and non-deductible expenses not directly enough related to the conservation of income-producing property to warrant applicability of Section 212. *E.g. Howard* v. *Commissioner,* 212 *F.* 2d 28 (9th Cir. 1953).

Wives (and their attorneys) have fared slightly better. Following several cases in which a portion of the wife's attorney fee was held deductible, Regulation 118, Section 39.24 (a)-1, was amended in 1952 to provide that "the part of an attorney's fee paid in a divorce or separate maintenance proceeding which is properly attributable to the production or collection of amounts includible in gross income under Section 22(k) is deductible under Section 23 (a) (2)". In other words, the fee for the attorney's services allocable to the production of taxable alimony is deductible by the wife as an expense incurred for the production or collection of income.

Although attorney fees in divorce proceedings which are held non-deductible are generally disallowed as "personal" expenses, it seems clear that in some cases the payor of such fees should be able to benefit at least through adding the amount to the adjusted basis of property for depreciation and gain and loss purposes. Where a spouse in negotiating a property settlement actually disputes the ownership by the other spouse of all or part of the property, the expense attributable to resisting such claim should be subject to treatment as a capital expenditure incurred in defending title. The situation in the *Baer* case, does not offer the alternative of capitalizing, had the husband failed to get his full deduction for fees paid, because title to property was not in issue, there being no dispute as to the fact that the stock held in the husband's name was actually his.

As a matter of over-all policy in connection with deductibility of the attorney's fee of the payor spouse in divorce proceedings, the question is posed whether the same equitable considerations which led to the enactment of Section 22 (k) of the 1939 Code permitting deduction of alimony payments would not also apply in a strong measure at least towards permitting deductibility of the attorney's fees paid by such spouse.

Participation in Organized Meetings

■ *The following letter was brought to the attention of the Editors of the* JOURNAL *by Laurens Williams, of Omaha, Nebraska. The letter is from Clarence A. Davis, Under Secretary of the Interior, and is addressed to all attorneys in the Department.*

■ All people in professional callings grow in breadth of knowledge, in methods and facilities of skill, and in professional competency, from attendance at and participation in organized meetings of their professional associates. I believe that this is true as to lawyers in the federal service.

My belief in this regard has long been recognized by all of the professions, by the Department and by the Congress. On the general subject, see the Interior Department Appropriation Act, 1954, sec. 102 (67 Stat. 261, 275); 27 Comp. Gen. 627 (1948); 17 Comp. Gen. 838 (1938); Solicitor's opinion M-35068 (September 8, 1948); and the Department of the Interior Supplement to the Federal Personnel Manual, chapter ID-L1-8.

The law lives with and grows on man's experience. Contacts with other lawyers engaged in other fields of activity and in other Departments, contacts with judges and public figures engaged in public administration, make the lawyer aware of evolving legal conceptions and give to him or her the breadth of vision to see the good or the evil to mankind that is consequent.

Because of the beliefs I hold, attendance by attorneys of the Department of the Interior at meetings of the American Bar Association, the Federal Bar Association, and State and local bar associations, which are held in the locality of the attorney's residence or of his official headquarters, will be considered as the performance of duties within the scope of employment.

Attendance by a limited number of attorneys at annual meetings of the American Bar Association, of the Federal Bar Association, and of State and of City and County Bar Associations, with the necessary travel time, by the shortest possible route by train, also will be considered as the performance of the duties within the scope of employment.

It is my belief that attendance from time to time by Federal lawyers, headquartered in Washington, at the noon meetings of the Federal Bar Association and, by those who belong, the Bar Association of the District of Columbia, will be beneficial to the work of the Department. Accordingly, I urge all departmental lawyers located at the seat of Government and in those other cities in which members of the legal staff of Interior are located and in which bar associations hold regular meetings, to attend and participate in such meetings, which will also be considered as performance of duty within the scope of employment.

Absence from the office for attendance at such meetings shall be reported to and excused in advance by the attorney in charge, if the work load permits.

I am sure all lawyers will be conscientious in arranging to absent themselves from their offices during official hours so that there will be no ground of criticism of the legal staff.

BAR ACTIVITIES

Paul B. DeWitt • Editor-in-Charge

Paul A. MUELLER

Phillips Studio

▪ At the annual meeting of the Pennsylvania Bar Association held at Bedford in June, Paul A. Mueller, of Lancaster, was elected President and Arthur Littleton, Philadelphia, was elected Vice President.

The three-day meeting opened with an address by the retiring President J. Campbell Brandon, of Butler.

Speaking at the conference of local bar association officers, Arch M. Cantrall, former President of the West Virginia Bar Association, discussed "Law Office Management".

At a luncheon meeting of the International Law Committee and the United Nations Review Conference, John G. Buchanan, of Pittsburgh, a former president of the Association, spoke on "United Nations Charter Review" and Philip W. Amram, Philadelphia, spoke on "International Rules of Judicial Procedure".

At the meeting of the Tax Section, Carl F. Chronister, of Harrisburg, Chairman, and Deputy Attorney General George W. Keitel, spoke on "Recent Developments in Pennsylvania Taxes".

At the second general assembly of the convention, the annual address was given by Boyd Lee Spahr, Philadelphia, whose subject was the "Colonial Courts of Pennsylvania". This was followed by a panel discussion of wire-tapping legislation, with J. Wesley McWilliams, of Philadelphia, serving as moderator. John Patrick Walsh, Chairman of the Committee on Criminal Justice and Law Enforcement of the Philadelphia Bar, and Louis B. Schwartz, Professor of Law at the University of Pennsylvania, spoke in support of the legislation. The opposing view was taken by Philip Price, a member of the Board of Governors of the Philadelphia Bar Association and Samuel Dash, Acting District Attorney of Philadelphia County.

An open meeting of the Joint Medico-Legal Committee, was addressed on "Medical Evidence in the Administration of Justice", by Dr. Alan R. Moritz, of Cleveland.

At a meeting of the Junior Bar Conference, the speaker was Thomas G. Meeker, Secretary of the American Bar Association's Junior Bar Conference and attorney for the Securities and Exchange Commission, Washington.

Meetings were held by the Insurance Section which was addressed by Francis R. Smith, Insurance Commissioner of Pennsylvania; and the Public Utility Law Committee at which Paul Coyle, Chief of the Section on Complaints, Bureau of Motor Carriers, Interstate Commerce Commission, and Dr. Herbert B. Doran, Professor of Economics, New York University, were the speakers.

At the Association's annual dinner, the address was given by Attorney General Herbert B. Cohen. Following the Attorney General's address there was a debate on the Pennsylvania Plan for the Selection of Judges, with Langdon W. Harris, Jr., of Philadelphia, speaking for the plan and Stephen A. Teller, of Wilkes-Barre, against it.

During the conference, the American Bar Association film, *Dedication to Justice* was shown for the first time in Pennsylvania.

▪ The New York State Bar Association and Albany Law School, in cooperation with the American Bar Association and The Traffic Institute of Northwestern University, presented a traffic court conference in June at Albany Law School. The conference opened with an address by Edmund H. Lewis, President of the New York State Bar Association, who was followed by three speakers on the importance of traffic courts to the State of New York. The speakers were Governor Averell Harriman, Attorney General Jacob K. Javits, and Joseph Kelly, the Commissioner of Motor Vehicles.

The conference was attended by judges, prosecutors and officials handling traffic violations in New York State and offered opportunities for training, guidance and discussion in the reduction of accidents, the promotion of safe driving and the dispensation of justice with maximum effect in traffic cases.

During the three-day session, James P. Economos, Chicago, Director, Traffic Court Program of the American Bar Association, spoke on "The Role of the Courts and Their Relation to the Traffic Problem"; "Civil and Criminal Responsibility in Traffic Accident Cases"; "Function of the Traffic Violations Bureau" and led two round table discussions: one on "Corrective and Educational Penalization" and the other on "Traffic Court Procedure", in which the participants were John Murtagh, Chief City Magistrate, New York; Paul Kelly, Police Justice, Freeport; Henderson Riggs, Recorder, Elmira; Wilmot Decker, City Judge, Middetown; Leslie J. Ekenberg, Presiding Judge of the Nassau County District Court; Edward A. Scott, Jr., Police Justice, Pelham; Stanley L. Van Rensselaer, City Judge in Saratoga Springs, and Alan M. Hill, former Monroe County Assistant District Attorney.

Franklin M. Kreml, Director of the Traffic Institute at Northwestern University lectured on "Traffic Law Enforcement—Controls Applicable", and Robert L. Donigan, General Counsel, Traffic Institute, North-

western University, spoke on "Traffic Offenses — Legal Aspects Involved", "Laws of Arrest" and "Accident Cases—Police Complaints".

"Uniform Traffic Laws and Ordinances" were discussed by Jack Weinstein, Professor of Law at Columbia University, and Edward R. Curtis, New York Consultant on Traffic Courts and Ordinances, Insurance Industry Committee on Motor Vehicle Accidents.

"The Relation of Bureau of Motor Vehicles to Traffic Courts" was discussed by Mortimer M. Kassell, Albany, Deputy Commissioner and Counsel, Department of Taxation and Finance and Arnold Wise, of Albany, Counsel, Bureau of Motor Vehicles.

Two films on automobile drivers were shown, "Traffic Offender in Court" and "Tomorrow's Drivers".

Albert W. KENNON

■ Albert W. Kennon, of Durham, North Carolina, was installed in office as President of the North Carolina Bar Association at its fifty-seventh annual meeting held in Asheville, North Carolina, June 15-18. He succeeded Joel B. Adams, of Asheville. Adams originated a revised organization of the Association along functional lines. Under the new Constitution the chairmen of standing committees were selected by the new president from among the fifteen members of the Board of Governors elected at the meeting for terms expiring in one, two and three years.

Mr. Kennon secured his LL.B. from Duke Law School in 1935, is a member of the American Bar Association and its Sections of Taxation and Corporation, Banking and Business Law. He has been Chairman of the Committee on Taxation, Chairman of the Executive Committee and member of other committees of the North Carolina Bar Association.

Highlights of the convention in Asheville included a report of a survey among North Carolina lawyers on office management and fees and featuring Mr. Luther M. Bang, of Austin, Minnesota, Chairman of the Minnesota State Bar Association's Committee on the subject. Special interest was further centered in the session conducted by the Committee on Real Estate, Probate and Fiduciary Law. Discussed was the revised Statute on Unauthorized Practice of Law enacted by the North Carolina General Assembly of 1955 which removed several provisions exempting lay activities. Joseph Trachtman, of New York City, spoke on "Estate Planning and Administration".

Sylvan Gotshal, of New York, President of the American Arbitration Association, gave an address on the subject of the lawyer's important role in arbitration.

At the closing session Nelson Woodson, of Salisbury, was chosen President-Elect of the Association, and William Storey, of Raleigh, was elected Executive Secretary.

After the meeting, at the suggestion of Governor Luther H. Hodges of North Carolina and Chief Justice M. V. Barnhill of the North Carolina Supreme Court, Mr. Kennon appointed a Special Committee on the Improvement and Expedition of the Superior Court System of North Carolina. This committee will report its study and recommendations to the Governor and the Chief Justice. The Standing Committees on Civil and Criminal Law and Administration have been assigned special projects for the promotion of the administration of justice in the state including the simplification of rules of civil procedure and the traffic court problem.

Aubrey Russell BOWLES, JR.

Dementi Studio

■ The 17th Annual Meeting of the Virginia State Bar was held at the Hotel Chamberlin, Old Point, Virginia, on May 5 and 6, 1955. The Council of the Virginia State Bar approved Social Security for lawyers on a voluntary basis. It authorized the printing and distribution of two pamphlets "Have You Made a Will?" and "So You are Going To Be a Witness". It reaffirmed its position formerly taken that judges should not serve on directorates of financial institutions. It disapproved a recommendation that the Bar establish a fund to cover losses sustained by lawyers' clients.

At the Annual Meeting, there were several interesting panel discussions, one on fees, another on "What Insurance Companies Expect of Trial Counsel", and a demonstration on "Medical Proof of Head Injuries Without Objective Findings at Date of Trial".

The Committee on Legislation and Law Reform made a very interesting report. The principal changes recommended were that the statute of descent and distribution be changed so as to put the surviving spouse in a more favorable position in regard to inheriting real property and to provide that a subsequent marriage not revoke a will. These recommendations will be presented to the next General Assembly of Virginia which meets in January, 1956.

Sir Leslie Knox Munro, K.C.M.G., New Zealand Ambassador to the United States and permanent representative of New Zealand to the United Nations, was the guest speaker.

Aubrey Russell Bowles, Jr., of Richmond, was elected President.

and E. Ralph James, of Hampton, was elected Vice President. Russell E. Booker, of Richmond, was re-elected Secretary-Treasurer. The officers assumed their duties on July 1, 1955.

■ A House Counsel Institute for the consideration of current problems of the business lawyer will be held in Madison, Wisconsin, August 8, 9 and 10. The Institute will be presented by the Wisconsin Bar Association and the University of Wisconsin Law School and Extension Division, in cooperation with the House Counsel Committee of the Milwaukee County Bar Association and the Wisconsin Manufacturers' Association.

The program has been planned to provide a profitable two and one-half days for the lawyer who is retained by a corporation in the capacity of legal adviser. Men of national reputation will participate in presenting practical and authoritative material of current importance.

"The Lawyer's Place in Business" will be discussed by Charles S. Maddock, of Delaware, Richard E. Sullivan, Chairman of the Department of Commerce, University of Wisconsin Extension Division; William J. Biehl, of Chicago, and Robert A. Ewens, of Milwaukee. Separate discussion groups to pinpoint particular problems will be led by Harold S. Silver, of West Allis; Gerald M. Swanstrom, of Milwaukee, and J. Ward Rector, of Milwaukee.

The second day's program will be devoted to current problems in trade regulation. The morning session will be opened by Milton Handler, Professor of Law at Columbia University School of Law, and member of the Attorney General's Antitrust Committee. Mr. Handler's speech, "Recommendations of the Attorney General's Antitrust Committee—Their Significance to House Counsel", will be followed by speeches by John C. Stedman, Professor of Law at the University of Wisconsin Law School, "Reconciling Patent Practices with the Antitrust Laws"; Ralph E. Axley, of Madison, "Current Problems of Merchandising in the Face of the Proportionately Equal Terms Requirements"; Reynolds C. Seitz, Dean of the Marquette University Law School, "Exclusive Dealing Arrangements in Buyer-Seller Relationships"; Edward F. Howrey, Chairman of the Federal Trade Commission, "The Federal Trade Commission and Business"; Lucius P. Chase, "Exclusive Dealings"; Joseph Dean, of Milwaukee, "Clearances for Acquisitions, Mergers and Consolidations"; and Malcolm Whyte, of Milwaukee, "Trade Associations".

"Current Problems in Industrial Insurance" will be the topic for the final half-day's discussion and the following experts in this field will participate: J. M. Sweitzer, of Wausau; P. N. Snodgrass of Madison; and Mortimer Levitan, Assistant Attorney General.

■ A Law-Science Short Course on Legal Medicine and Elements of Medico-legal Litigation was held in July in Chicago sponsored by the Law-Science Institute of the Schools of Law and Medicine, University of Texas.

The course, which was directed and conducted by Hubert Winston Smith, LL.B., M.D., Professor of Law and of Legal Medicine and Director of the Law-Science Institute, consisted of panels and lectures in which medical specialists and trial lawyers participated. The course was designed to give the registrants a large fund of general principles and detailed information relevant to proper handling of medico-legal claims. The following subjects were stressed: Relation of Trauma to Injury and Disease; Basic Principles of Traumatology; Medico-legal Aspects of the Organ System; Medico-legal Aspects of the Invertebral Disc; Medico-legal Aspects of Orthopedic Injuries with Special Reference to Back Injuries; Medico-legal Aspects of Injuries of the Nervous System with Particular Reference to Head Injuries; Trial Practice and Medico-legal Trial Technique.

John M. PALMER

Ross

■ John M. Palmer, Minneapolis, was named the new president of the Minnesota State Bar Association at its annual meeting in the St. Paul Hotel, St. Paul, June 22-24. He succeeds Sidney P. Gislason, of New Ulm, as president.

Other officers elected are John B. Burke, St. Paul, Vice President; James D. Bain, Minneapolis, re-elected Secretary and Earl R. Anderson, St. Paul, re-elected Treasurer.

Guest speakers at the three-day meeting included Charles S. Rhyne, President of the Bar Association of the District of Columbia; Chief Justice Irving Ben Cooper of the Court of Special Sessions of the City of New York; Ivar H. Peterson, Washington, D. C., member of the National Labor Relations Board and Orville L. Freeman, Governor of Minnesota.

A resolution was unanimously adopted endorsing President Eisenhower's appointment of Warren E. Burger as Judge of the Court of Appeals for the District of Columbia Circuit and recommending that his appointment be confirmed by the Senate of the United States.

The convention opened with a Tax Institute June 22. Social Security tax matters, retirement income credits and dividend credits, recent tax changes affecting joint tenancy and income and inheritance tax changes in the 1955 Minnesota legislature were some of the subjects discussed.

Holding meetings in conjunction with the state bar association were the District Judges Association, the

County Attorneys Association and the Probate Judges Association. A real property institute and a labor institute were held the final day of the convention.

The Public Relations Committee awarded individual plaques to Daniel H. Ridder, *St. Paul Dispatch-Pioneer Press;* Ben Kern, *Minneapolis Tribune;* Miller C. Robertson, WTCN-TV and Donald C. Brown, Minnesota Editorial Association.

The film "Dedication to Justice" was shown to the meeting at two separate times. It was well received and is an inspiration to the members of the Bar and the lay public.

A telegram with hundreds of names was sent to the Ways and Means Committee of the House of Representatives, Washington, D. C., endorsing and urging enactment of the Jenkins-Keogh Bills having to do with self-employed persons.

W. J. Wheeler of Minneapolis, Chairman of the special committee of the state association on lawyers retirement plans, appeared before the Ways and Means Committee on June 27, 1955, in Washington.

Fred A. SMITH

■ The Diamond Jubilee meeting of the Ohio State Bar Association, organized on July 8, 1880, was held May 19-21 at the Biltmore Hotel, Toledo, with an attendance of about 1,600.

The program included institutes on legal aid, real estate law, workmen's compensation, negligence law, taxation, labor law and courtroom publicity. The latter institute was addressed by Elisha Hanson, of Washington, D. C., General Counsel of the American Newspaper Publishers Association. Erle Stanley Gardner was the principal speaker at the annual banquet. General William J. Donovan, former director of the Office of Strategic Services, spoke at a luncheon meeting. John C. Durfey, President of the Association, presided over all the general sessions.

Fred A. Smith, of Toledo, and Earl F. Morris, of Columbus, were elected at the final session to the offices of President and Vice President. They took office on July 1.

■ An Institute on industrial relations sponsored by the Wisconsin Bar Association, Labor Law Section and the University of Wisconsin Law School Extension Division in cooperation with the American Arbitration Association and the University of Wisconsin Industrial Relations Research Center, was held in July in Madison.

The Institute dealt with current problems of major importance to labor, management and the public. The principal subjects discussed were Collective Bargaining, Mediation and Arbitration, The Taft-Hartley Act, "Union Security" and State "Right To Work" Laws, Federal-State Jurisdiction over Labor-Management Relations, Social Legislation and Unemployment Compensation, and Legal and Practical Implications of the AFL-CIO merger.

Highlighting the program was an address by Secretary of Labor Mitchell.

Among the expert representatives of management and labor were Robert Biron, Fort Worth, Texas, Collective Bargaining Chairman for the West Coast Air-frame Industry; J. Noble Braden, New York, Executive Vice President of the American Arbitration Association; William Caples, of Chicago; David L. Cole, former director of the Federal Mediation and Conciliation Service Chairman of the Secretary of Labor's Advisory Committee on Labor Relations in Atomic Energy Installations; Impartial Arbitrator of AFL-CIO Jurisdictional Disputes; Archibald Cox, Professor of Law at Harvard University School of Law; Owen Fairweather, of Chicago; Guy L. Farmer, Chairman of the National Labor Relations Board; Joseph F. Finnegan, Director of the Federal Mediation and Conciliation Service; R. W. Fleming, Director of the Institute of Labor and Industrial Relations, Champaign, Illinois; Jacques Friedrich, Secretary of the Federated Trades Council, Milwaukee; John Gall, of Washington, D. C., formerly general counsel for the National Association of Manufacturers; Stephen K. Galpin, Washington labor correspondent, for the *Wall Street Journal;* Arthur J. Goldberg, General Counsel of the CIO and of the United Steelworkers of America; Laurence E. Gooding, Chairman of the Wisconsin Employment Relations Board; A. J. Hayes, President of the International Association of Machinists; Curt E. Hoerig, of Milwaukee; Henry Kaiser, of Washington, D. C.; Theophil C. Kammholz, General Counsel of the National Labor Relations Board; Myer Kestnbaum, Chairman of the President's Committee for Economic Development; Leon Lamfrom, of Milwaukee; Leonard Lesser, Legal Consultant for the Social Security Department, UAW-CIO; Lambert H. Miller, General Counsel of the National Association of Manufacturers; Louis H. Parent, of Milwaukee; Merlyn S. Pitzele, Chairman of New York State Mediation Board; James I. Poole, of Milwaukee; Max Raskin, of Milwaukee; Stanley Rector, Legislative Director of the Unemployment Benefit Advisors, Washington, D. C.; Stuart Rothman, Solicitor of Labor, U. S. Department of Labor; H. W. Story, of Milwaukee; Herbert S. Thatcher, formerly with the Office of General Counsel, AFL; Elmer E. Walker, General Vice President of the International Association of Machinists; L. N. D. Wells, Jr., of Dallas, Texas; Paul Whiteside, Vice President of the Wisconsin State Federation of Labor and Secretary-Treasurer of the Brass and Copper Workers Federal Labor Union

19822, AFL; Edwin E. White, Professor of Economics of the University of Wisconsin; J. Albert Woll, General Counsel, AFL; and Donald Yolton, Representative of the UAW-CIO, La Crosse.

Reuben OPPENHEIMER

Fabian Bachrach

■ Some 300 lawyers from all over the State of Maryland attended the annual meeting of the Maryland State Bar Association, held June 23, 24 and 25 in Atlantic City, New Jersey. Including wives and other members of lawyers' families, there were 578 persons registered.

Among the featured speakers were Simon E. Sobeloff, the Solicitor General of the United States; Frederick W. Brune, Chief Judge of the Court of Appeals of Maryland; and former Solicitor General, Philip B. Perlman. A large number of the state's various circuit judges were also present.

The meeting was presided over by Judge Stedman Prescott, of Rockville, the President of the Association.

The winning essay on the subject "Religious Freedom under the Federal Constitution" was read by its author, Charles F. Downs, of Denton, who had just been graduated from high school. The essay was the winning entry in the third essay contest sponsored by the Association's American Citizenship Committee. The $500 prize was contributed by members of the Association.

Reuben Oppenheimer, of Baltimore, was elected president, and the following were named Vice Presidents for the eight circuits: First, Stanley G. Robins, of Salisbury; Second, William Wilson Bratton, of Elkton; Third, A. Freeborn Brown, of Bel Air; Fourth, William L. Wilson, Jr., of Cumberland; Fifth, Judge James Macgill, of Ellicott City; Sixth, Benjamin B. Rosenstock, of Frederick; Seventh, Ralph W. Powers, of Hyattsville; Eighth, J. Stuart Galloway, of Baltimore, and J. Gilbert Prendergast, of Baltimore. Robertson Griswold was elected Treasurer, and S. Vannort Chapman, Secretary. Judge E. McMaster Duer, of Princess Anne; William Aleck Loker, of Leonardtown; James H. Pugh, of Rockville; and G. C. A. Anderson, of Baltimore, were elected members of the Executive Council.

■ On May 16, 1940, the Inter-American Bar Association was organized at a meeting held at the Mayflower Hotel, Washington, D. C., during the eighth American Scientific Congress. In recognition of the fifteen years that have elapsed since its organization, interested members in Washington gathered at a luncheon at the University Club on May 17 and reviewed the developments which have taken place in the life of this association of lawyers of this hemisphere.

Reference was made to the eight conferences which have been held at Havana, Cuba, 1941; Rio de Janeiro, 1943; Mexico City, 1944; Santiago de Chile, 1945; Lima, Peru, 1947; Detroit, Michigan, 1949; Montevideo, Uruguay, 1951, and Sao Paulo, Brazil, 1954.

As a result of these meetings important resolutions have been adopted and progress has been made in unifying the commercial laws in this hemisphere. Numerous friendships have also been made among the lawyers of the Americas and better understanding has been promoted in accordance with the purposes of the Association set forth in its Constitution as follows:

> To establish and maintain relations between associations and organizations of lawyers, national and local, in the various countries of the Americas, to provide a forum for exchange of views.
>
> To advance the science of jurisprudence in all its phases and particularly the study of comparative law; to promote uniformity of commercial legislation; to further the diffusion of knowledge of the laws of the various countries throughout the Americas.
>
> To uphold the honor of the profession of the law; and to encourage cordial intercourse among the lawyers of the Western hemisphere.
>
> To meet in conferences from time to time for discussion and for the purposes of the association.

The members of the Association look forward to the Ninth Conference which will be held in Dallas, Texas, April 16 to 21, 1956, under the presidency of Robert G. Storey, past President of the American Bar Association and Dean of the Law School of Southern Methodist University. The host associations on this occasion will be the State Bar of Texas, the Dallas Bar Association and the Southwestern Legal Foundation.

Practicing Lawyer's guide to the current LAW MAGAZINES

Arthur John Keeffe • Editor-in-Charge

CONSTITUTIONAL LAW: Looking over the past year's law review articles, I came across a most timely note in this day of the renowned Congressional Investigative Committee. Robert B. Tunstall writes in the November, 1954, issue of the *Virginia Law Review* on the Scope and Limitations of the Investigating Power of Congress. He reviews the legal precedents behind such undertakings and constructively analyzes the essential and inherent purposes of the Congressional Investigative Committee while being ever cognizant of the opportunity for the demagogue and charlatan to utilize this forum for smear and slander, hiding under the skirts of constitutional immunity. The need for continued reform is stressed. To both myself and Mr. Tunstall, the significantly increasing vigilance by lawyers, law professors, publicists and Congressmen themselves is a good sign toward a healthy future. (Vol. 40, pages 875-897; address: Virginia Law Review, Clark Memorial Hall, Charlottesville, Va.; price for a single copy, $1.50.)

CRIMINAL LAW: I came upon a very interesting and informative comment in the *Texas Law Review* of April, 1955, on "Mental Disorders and Criminal Responsibility: The Recommendation of the Royal Commission on Capital Punishment". In it, Edwin W. Stockly clearly examines and discusses the tests used to determine the defendant's responsibility for a criminal act. He and the Royal Commission both rightly point out that the final determination as to the responsibility of a specific defendant for his criminal act is made by the men and women sitting on the jury asking, "Is this man mad or is he not?" The court is supposed to give them a logical charge on which they can base their determination. Yet the courts continue to follow the legal rules set down years ago. First came the rules in *McNagten's* case and, to the criteria set down in that case, some courts have added the "irrepressible impulse" rule. Still other courts have followed the New Hampshire rule of mental disease or defect—whether the mental disease or defect was the cause of the criminal act. Only the last tries to reconcile the legal concept of insanity with the medical and permits a psychiatrist to describe the true mental condition of the defendant. A fourth rule, the doctrine of partial responsibility, is one of administrative procedure after trial and conviction and not one in which the court or jury have any determination. After their study, the Royal Commission could not arrive unanimously at a recommendation for a change in the criminal code in Britain, so no change was made at all. Mr. Stockly concludes that law and medicine alone are inadequate to resolve the conflict between the desire of society to impose punishment upon wrong-doers and the desire not to punish those not responsible for their acts. It is the conscience of society, speaking through a jury guided by a court which can best resolve this conflict. (Texas Law Review, Vol. 33, No. 4; pages 482-498; price for a single copy, $1.50.)

LABOR LAW: An examination of the law of peaceful picketing is undertaken in a recent law note contained in the winter issue of the *Buffalo Law Review*. The writer traces the United States Supreme Court decisions on this thorny problem, showing the development of the law from a position where picketing and free speech were almost synonymous to the present situation where under certain circumstances it is permissible to enjoin even peaceful picketing. The article further explores the knotty jurisdictional problems attendant on this complex field and rightly points up the need for clarifying legislation to develop a workable balance between the legal action of state courts and the doctrine of federal pre-emption. (Vol. 4, No. 2, pages 232-245; address; 77 W. Eagle St., Room 220, Buffalo 2, N. Y.; price for a single copy, $1.25.)

PREPARATION FOR TRIAL: Dean Milton C. Green, of the University of Washington School of Law, has written an article which is a must for young attorneys and a welcome refresher for us old-timers. Painstakingly, Dean Green outlines the steps to be taken by a lawyer in order to be adequately prepared for trial. Lawyers are engaged in armed conflict. Armed with facts and the law, they engage in a battle of wit and reason, surprise and ambush, controlled only by the rules of the game. But, uppermost in this skillful controversy is one basic maxim—KNOW YOUR CLIENT'S CASE, BUT KNOW YOUR OPPONENT'S AS WELL. (Vol. 1955, No. 2, Washington University Law Quarterly, pages 154-170; address: Washington University, St. Louis, Mo.; price for a single copy, $1.25.)

SELF-INCRIMINATION: The current reappraisal of the scope and meaning of the privilege against self-incrimination in the light of present-day conditions has aroused renewed interest in its origin and early development. Dean Griswold

contends that "our old friend" can be traced back to the twelfth century and that it came to this country "as part of the legal heritage of our early settlers". (Griswold, *The Fifth Amendment Today*, pages 1, 2, 4 [1954].) In a recent review of this book (30 *New York University Law Review* 736, March, 1955), the Dean was taken to task for these observations, the reviewer adding: "The Dean's references to the *Lilburne* case and to the maxim *'nemo tenetur prodere se ipsum'* are sketchy and unenlightening; we need something much more detailed to develop an insight into their historical significance." (*Id.* at 743, 744) For that "more detailed" exposition and analysis of Lilburne's influence on the development of the maxim and of the privilege, we are indebted to Harold W. Wolfram whose stirring account of the struggle for civil liberty in Stuart England appeared several years ago under the title: "John Lilburne: Democracy's Pillar of Fire" (3 *Syracuse Law Review*, pages 214-258, spring, 1952). Whether the privilege did or did not originate in the twelfth century is beside the point. The fact is, as Mr. Wolfram emphasizes, that English courts, in a period of great national peril, recognized and applied the privilege, in substantially its present form, before Englishmen began to enjoy freedom of worship, freedom of speech and freedom of the press, before Englishmen knew the right to be secure against unreasonable searches and seizures and not to be twice put into jeopardy for the same offense, and before they were accorded such elementary procedural rights as a copy of the indictment, adequate time to prepare a defense, the assistance of counsel, compulsory process for obtaining witnesses and the right to have witnesses sworn. We have had many references of late to John Lilburne. If you want to read the story of a courageous fight for liberty "at the very outposts of Democracy", including an account of one of the most turbulent and exciting criminal prosecutions in English history, get a copy of this entertaining and enlightening article. (Write Syracuse Law Review, Ernest I. White Hall, Syracuse 10, N. Y., and send $1.00.)

TAXATION: In the land-mark year of 1954, tax articles were especially interesting and important. In the December, 1954, issue of the *Columbia Law Review* (Vol. 54—No 8, pages 1267—1290) there appears a rather extensive student note dealing with "Clearly Reflecting of Income Under Section 446 of the Internal Revenue Code". It is a well-known fact that no one method of accounting is required of all taxpayers, and that any generally approved method will in most cases clearly reflect income. But, nevertheless, the method chosen must meet certain requirements. There must be adequate records; the method chosen must be consistently used without materially distorting annual income; and its use cannot cause excessive administrative inconvenience which would result in an undue loss of revenue. With these principles in mind, the writer has selected various situations in which they are applied, such as installment and long term contracts as they relate to the methods used—cash, accrual, or a permissible hybrid form. Here is a worthwhile article pointing out certain consequences which arise when a taxpayer exercises his right of election. (Copies may be obtained from the Columbia Law Review, Kent Hall, Columbia University, New York 27, New York. The price is $1.25 per copy.)

WIRE TAPPING: Richardson Dilworth and Samuel Dash, two District Attorneys of the City of Philadelphia, have written an article in the March, 1955, *Dickinson Law Review* on this red hot legal and moral issue. They take a decided prosecutor's viewpoint. They decry those who say that wire tapping should be completely abolished. Instead they offer a sample statute which would limit wire tapping by strict issuance of warrants and severe penalties for abuse. The authors brush aside constitutional arguments of invasion of privacy and the home by saying that the needs of the individual must be balanced against the need for public security. Their major point is that our personal rights are invaded to a greater degree by searches and seizures which are upheld by the courts; therefore, why not wire tapping? ("A Wire Tap Proposal", Vol. 59, March 1955, No. 3, Dickinson Law Review, Carlisle, Pa.; price for a single copy, $2.00.)

OUR YOUNGER LAWYERS

Thomas G. Meeker, Secretary and Editor-in-Charge, New Haven, Conn.

■ Chairman Stanley B. Balbach, of Urbana, Illinois, announced recently that five members of the Conference had filed petitions for the National Offices of Chairman, Vice Chairman and Secretary. The petitions for these offices were required to be filed by June 15, 1955. The election will occur on Saturday, August 20, 1955.

Vice Chairman Robert G. Storey, Jr., of Dallas, Texas, is the only candidate for National Chairman. Prior to his election as Vice Chairman of the Conference at the Annual Meeting last year, Mr. Storey served as a member of the Executive Council and in 1953 served as Professional Director.

Nominating petitions have been filed on behalf of three members of the Conference for the office of National Vice Chairman.

C. Severin Buschman, Jr., of Indianapolis, Indiana, is serving this year as a member of the Executive Council and has been active in past years in connection with committee work of the Conference. He is a former Executive Secretary of the Indiana State Bar.

William C. Farrer, of Los Angeles, California, is presently Information Director for the Conference. He served during 1954 as Chairman of the Unauthorized Practice of Law Committee and as Chairman of the Conference's Nominating Committee at the Annual Meeting in 1954. He is presently liaison member serving with the Association's Committee on Unauthorized Practice.

C. Frank Reifsnyder, of Washington, D.C., is presently a member of the Executive Council, representing the District of Columbia. He is a delegate to the Board of Directors of the Bar Association of the District of Columbia for the Junior Bar Section and is also serving presently as Chairman of the Junior Bar Section of the District of Columbia. He has served in the past as a delegate for the District of Columbia to the Junior Bar Conference.

A nominating petition for the office of National Secretary has been filed in behalf of Robert L. Meyer, of Los Angeles, California. He is presently serving as a member of the Executive Council for the Ninth Circuit. He has served on the Special Committee on Election Procedure for Members of the Council in 1954, and as a member of the Legal Aid and Lawyer Reference Committee in 1953. He served as Second Vice President of the California State Conference and Junior Bar Members in 1953, and has been a member of the council of that group since 1951.

Nominating Petitions for Council Representatives

Chairman Balbach also announced recently that he had received petitions for nomination to the Executive Council from various Circuits. Petitions have been filed on behalf of candidates from the following Circuits:

Third Circuit: F. Hastings Griffin, Jr., of Philadelphia, Pennsylvania, presently a member of the Executive Council.

Fifth Circuit: Robert R. Richardson, of Atlanta, Georgia, presently serving as Conference State Chairman in Georgia and Chairman of the Conference's Activities Committee.

Fifth and Eighth Circuits at Large: Edward B. Winn, of Dallas, Texas, former State Chairman of the Texas Junior Bar, presently Vice Chairman of the Conference's Activities Committee and a former Vice Chairman of the Conference's Public Information Committee.

District of Columbia: Paul R. Madden, of Washington, D. C., presently Chairman of the Conference's Committee on Military Service and formerly a delegate from the District of Columbia Junior Bar to the Junior Bar Conference.

Conference's Activities at Cincinnati

At the Big Seven Regional Meeting in Cincinnati, June 8 through 11, 1955, the Conference, in co-operation with the Association's Section of Judicial Administration, sponsored a panel discussion on the subject "Fair Trial and Free Press". Alexander Holtzoff, United States District Judge for the District of Columbia, presided as moderator for a panel which included Florence E. Allen, Judge of the United States Court of Appeals for the Sixth Circuit; J. Russell Wiggins, Managing Editor of the *Washington Post and Times-Herald;* and Richard P. Tinkham, of Hammond, Indiana, Chairman of the Association's Committee on Public Relations and a member of the Board of Governors. This program and the very successful dance on Friday evening of the meeting, were under the general supervision of the Conference's Chairman for the meeting, Bruce I. Petrie, of Cincinnati.

On Saturday morning, June 11, the conference held a joint circuit breakfast to discuss problems of the various states within the Sixth and Seventh Circuits. The breakfast meeting was attended by National Chairman Balbach, National Secretary Meeker, Sixth Circuit Council Representative Rosemary Scott, of Grand Rapids, Michigan, Seventh Circuit Council Representative C. Severin Buschman, Jr., of Indianapolis, and State Chairmen A. D. Van Meter, Jr., of Springfield, Illinois, Robert H. Giffs, of Janesville, Wisconsin, and Kennedy Leger, Jr., of Dayton, Ohio.

Ray Garrett, of Chicago, Illinois, Chairman of the Association's Section of Corporation, Banking and Business Law, recently reported to the Conference that that Section had published a pamphlet entitled *Cumulative Voting in the United States —A Bibliography*. This pamphlet was based on a research project of the

Conference under the direction of Professor Charles B. E. Freeman, of Tallahassee, Florida, who is Associate Professor, Florida A. & M. University, and Vice Chairman of the Conference's Law Students Committee. The bibliography includes constitutional references, statutory references, court decisions, legal texts and law review articles. Copies may be obtained from the Association's Section of Corporation, Banking and Business Law.

State Chairman Robert R. Richardson of the Younger Lawyers Section of the Georgia Bar Association recently reported the publication of a handbook for jurors prepared by a special committee of his section. The pamphlet, which deals with information of importance to individuals serving as jurors, has been enthusiastically received by court officials throughout the state, and Chairman Richardson hopes ultimately to have a state-wide distribution involving almost 100,000 copies. The publication of the pamphlet this year was particularly timely since women are now qualified as jurors in Georgia by virtue of an Act of the 1954 Legislature.

A special committee of the Connecticut Junior Bar, under the chairmanship of Edwin K. Dimes, of Westport, Connecticut, has drafted a new handbook for use by jurors in the State of Connecticut. The draft has been submitted to members of the judiciary and to clerks of the courts in Connecticut, and will soon be submitted to the Judicial Council of Connecticut for adoption by the Council. It is hoped that this new pamphlet will be available in the fall.

Chairman Balbach recently announced that Leo Dorfman, of Minneapolis, Minnesota, was appointed to serve as Chairman for the Junior Bar Conference for its activities in connection with the Northwest Regional Meeting. Members of the Committee serving with Mr. Dorfman for that meeting include the following: Joseph A. Rheinberger, co-chairman, Salisbury Adams, Sheridan Buckley, Jr., Robert E. Faricy, Jr., C. Paul Jones, Clark MacGregor, John R. deLambert, William C. Meier, David R. Roberts, Thomas Scallen, Hyam Segell, Edward C. Springer and Fred Thorson.

Chairman Charles F. Blanchard, of the Junior Bar Section of the North Carolina Bar Association, reports that his section held its Second Annual Meeting at the Battery Park Hotel, Asheville, North Carolina, on Friday, June 17. The meeting was held in conjunction with the 57th Convention of the North Carolina Bar Association. The principal speaker at the luncheon was Dean Carroll W. Weathers, Dean of the Wake Forest School of Law. Reports were received from committee chairmen, including the Executive Committee report, William L. Thorp, Jr.; Moot Court Committee, Richard L. Whorton; Continuing Legal Education, Noel Woodhouse; Insurance Committee, J. Brian Scott; and legislative report, Wallace C. Murchison.

Chairman Balbach announced recently the appointment of Wilbert E. Dolph, Jr., of Tucson, Arizona, as Junior Bar Conference State Chairman for the State of Arizona, succeeding Calvin H. Udall, of Phoenix, Arizona. The Chairman also appointed Elmer O. Friday, Jr., of Orlando, Florida, State Chairman for the State of Florida, succeeding Thomas H. Barkdull, Jr. of Miami. Edward Lester, of Little Rock, Arkansas, has been appointed as State Chairman for the State of Arkansas, succeeding John C. Deacon, of Jonesboro, Arkansas. Chairman Balbach has appointed Dr. George W. Pugh, Judicial Administrator for the State of Louisiana, as State Chairman for that state, succeeding Paul C. Tate, of Mamou, Louisiana.

Our Relations with Latin America

(Continued from page 732)

selves. From a domestic U. S. point of view you might feel that it makes little difference if we reduce our farmers' sales of ham to Latin America by $100 if, at the same time, we increase by $100 some other producer's sales of a product that competes with one we buy in another American republic. One U. S. producer gains, another loses. But there are a couple of other fellows who lose. One is the American consumer who may be forced to pay more for the products he wishes to buy if imports are kept out. Another is the Latin-American producer. To many of the other American countries these sales in the U. S. market are the lifeblood of their national economy. They represent the difference between economic and often political stability on the one hand and chaotic conditions on the other. We may say that this is an unwholesome situation, and that such countries should diversify their economies. Believe me, they would be the first to agree, and many are striving to do so. But for the time being the undeniable fact remains that if it is important to the United States that there be economic and political stability in our sister republics we must resist the attempts of our own affected domestic groups to restrict access to our markets. Such a policy may pinch some of our domestic industries. But if we reduce Latin-American quotas or raise tariffs, we simply shift the pinch to those of our exporters whose annual plantings, whose payrolls, whose factory operations are now geared to a $3½ billion market in Latin America.

So for Latin America the crucial economic question is what will be the foreign trade policies of this Government toward the rest of the hemisphere? What are they?

First, we rely primarily upon private enterprise rather than its replacement by government in business. In his foreign economic policy message to Congress this year, Presi-

dent Eisenhower said: "The nation's enlightened self-interest requires a foreign economic program that will stimulate economic growth in the free world through enlarging opportunities for the fuller operation of the forces of free enterprise and competitive markets."

High Living Standards . . . *Reward of Private Enterprise*

Why do we believe so strongly in private enterprise? Simply because, better than any other system yet devised by mankind, it has demonstrated the capacity to achieve high living standards, to produce large volumes of goods and services of good quality and make them available to consumers at attractive prices. That cannot be accomplished in any country unless its men and women are resourceful, hard-working and self-disciplined—unless in that country there are strong business enterprises offering wide employment at adequate wages. A man is not resourceful, industrious and self-disciplined unless he has an incentive. Under the private enterprise system that incentive is personal gain. Under it a man who strives to further his personal interests must at the same time serve those of his fellow citizens. That is the genius of today's socially conscious private enterprise. It has produced every strong economy of free people that the world has seen. Under Communism, on the other hand, the incentive to work and discipline is cold fear, fear of slave camps, of torture and bloody purges. We have just seen the heads of 30,000 of Russia's 94,000 collective farms replaced by untrained party members rounded up in the cities. God pity those 30,000 farm leaders who didn't make their quotas! Under the Communist system the wages of failure are death or slavery.

We believe in the private enterprise system and we believe that in the twentieth-century socially conscious American businessman, whether Argentine, Colombian, North American or what have you, lies the greatest hope for the prosperity and the greatness of this hemisphere. He deserves the support and confidence of our governments.

The next principle of our economic policy is support for the expansion of international trade. On this the President has said: "For every country in the free world, economic strength is dependent upon high levels of economic activity internally and high levels of international trade. No nation can be economically self-sufficient. Nations must buy from other nations, and in order to pay for what they buy they must sell. It is essential for the security of the United States and the rest of the free world that the United States take the leadership in promoting the achievement of those high levels of trade that will bring to all the economic strength upon which the freedom and security of all depends."

In order to implement this policy of reducing trade barriers, the President has renewed his request for a three-year extension of authority to negotiate tariff reductions with other nations on a gradual, selective and reciprocal basis. That proposal is now under consideration in the Senate. Its decision will have a profound effect on both economic and political progress and stability in this hemisphere.

As you know, the President will also ask congressional approval for United States membership in the recently negotiated Organization for Trade Co-operation which will administer the General Agreement on Tariffs and Trade, pursuant to which the United States and thirty-three other trading countries are co-operating in an effort to reduce trade barriers.

Many of the Latin-American countries have expressed interest in supplementing the dollars they earn through trade by an increase in private American investment in their economies and an increase in governmental loans for economic development. The need for additional economic development capital in some of the other American Republics is generally recognized.

Most of this capital, we believe, can come and should come from private sources. The private investor, both domestic and foreign, is by far the most prolific source of capital. The most productive course for any government to follow in seeking investment capital is to establish conditions that create confidence in private investors—particularly its own nationals. The estimated $1 billion of short term balances and the estimated $500 million of long term investments which Latin-American private interests now have in United States banks and other institutions would begin to flow homeward, where it can do far more for economic development than the same amount of loan capital. Nothing so effectively inspires this confidence as clear assurance that the government does not intend to invade the field of industry and commerce. Nothing so discourages the private investor as the fear that tomorrow he may find himself replaced by or in competition with the government. In countries where local investors are full of confidence there is traditionally no shortage of foreign capital. On the other hand, if conditions discourage domestic investors, it is useless to think of attracting any substantial amount of foreign capital.

The benefits of United States' private investment to the Latin-American countries are well known. It has a very favorable effect upon their balance of payments position. For example, United States owned enterprises in Latin America now produce 30 per cent of the area's exports to the United States, or about $1 billion a year. This is, however, but one part of the measure of the benefit of the investment. In addition, a large sum is saved each year by the Latin-American countries because of the output of United States owned manufacturing enterprises producing for domestic consumption there. Investments in these manufacturing enterprises have tripled since 1946 and now total over $1.2 billion. Such enterprises produce some 15 per cent of the total manufacturing output of the area, or the equivalent of $1.5

billion annually. This amount is almost half as large as total Latin-American imports from the United States and represents a very significant saving in dollars that would otherwise have to be spent for imports. Moreover, dollars converted for tax purposes by U. S. concerns not only improve the balance of payments position but form an important part of the estimated equivalent of $1 billion in direct and indirect taxes paid annually to Latin-American governments by U. S. concerns, which constitute the principal source of revenue for many countries. Equally important, though not measurable in dollars and cents, is the stimulus to local development coming from the introduction of new enterprises, modern production techniques, the accompanying development of skilled labor and resulting higher incomes.

The primary responsibility for attracting United States investors to Latin America rests on each interested government and people. Our own role in this field is decidedly secondary. Yet the Government is taking resourceful measures to encourage our investors to enter those foreign areas where they are wanted. We are trying to follow a policy which, as the President has put it, "results in investment by individuals rather than by governments".

To accomplish this, the President proposes three measures. First, that Congress reduce taxes on business income from foreign subsidiaries or branches and defer those taxes until the income is removed from the country where it is earned; second, to explore the use of tax treaties which would, under proper safeguards, give credit for foreign income taxes which are waived for an initial limited period, just as our Government now allows credit for those taxes which are actually paid abroad. Finally, the executive branch will recommend approval by Congress of our participation in the proposed International Finance Corporation, an affiliate of the International Bank, which will make development loans to private enterprise abroad without government guarantees and which will be authorized to invest in debentures and similar obligations. If, as contemplated, that corporation is established with an initial capital of $100 million it will, in association with private capital from other sources, result in a total investment of a much larger amount.

We all know that there are certain types of necessary projects for which private capital is not reasonably available. These have to be financed by governments. The United States is responding effectively to Latin America's desires for access to governmental loans for this type of project. We have assured the other American Republics that through the Export-Import Bank we shall do our utmost to satisfy all applications for sound economic development loans where the funds are not reasonably available from private sources or the International Bank. This means, in effect, that no economic development loans are going to be turned down for lack of funds. The level of lending for this purpose within the hemisphere by our Export-Import Bank is going to be determined largely by Latin America itself, as it will depend on the volume of sound loan applications which are presented.

This new liberalized credit policy toward Latin America was announced last summer. Since then there has been a striking change in the total credits authorized by the Export-Import Bank for Latin America. For the ten-month period from July 1, 1954, to April 30, 1955, loans and exporter credit lines authorized for Latin America were $389 million—more than ten times as much as during the first six months of 1954. Assuming that the volume of sound loan applications continues, it can be expected that the Bank's activities in Latin America will continue at an accelerated rate.

In addition to the credits granted by the Export-Import Bank, the International Bank has made loans to Latin-American countries totaling $136 million since July 1, 1954. This amounts to 31.4 per cent of the $433 million of loans granted by the International Bank in that period.

We feel that our technical aid programs are of great importance in the implementation of our general policies in the economic field. Over the past twelve years the United States has contributed much to the development of Latin-American economies through programs in such primary fields as health and sanitation, agriculture, education and public administration. More than two thirds of the costs of these programs are now contributed by the host governments in Latin America. Increased appropriations are permitting new programs of technical aid for Latin America to be undertaken.

In areas of the world other than Latin America, our government has found it necessary on an emergency basis in the years since World War II to provide grant aid to distressed peoples. Very properly, the Latin-American governments have preferred to rely on their own earnings in an expanding international trade and upon sound loans for their economic development. Nevertheless, in 1954 there were occasions when we did furnish grant aid to meet emergency conditions. When declining tin prices made it impossible for Bolivia to import foodstuffs needed to avert a domestic crisis, we undertook a program of grant aid which is continuing this year. We also furnished assistance to Guatemala to meet emergency needs encountered when the expelled Communist government was found to have looted the national treasury. Similarly when a disastrous hurricane struck Haiti last fall we furnished foodstuff and supplies to reduce hunger and suffering.

Of the specific programs in implementation of our policies toward Latin America, I wish to mention also our interest, along with that of the other republics concerned, in an accelerated program to complete the Inter-American Highway. This 3,000-mile highway from our border with Mexico, through that country and the five Central American republics and Panama to the Canal

Zone, is of great economic, political and strategic importance to the area it traverses and to ourselves. A quarter of a century of work has already been put into the highway and the greater part of it is already in use. Two weeks ago, President Eisenhower wrote to the presiding officers of the Senate and the House of Representatives urging that funds be appropriated to permit the United States to contribute funds for its completion within three years, with the other contributing countries paying one third of the cost.

These are your Government's policies in the inter-American field. These are the major programs through which we seek to implement these policies. These policies and programs depend for their success on the achievement of a broad identity of purpose between ourselves and the other members of the American family, an identity of purpose which must encompass all of the major fields of human endeavor, cultural, political, economic and military.

The efficacy of these policies in the cultural, political and military fields has been demonstrated over the years that they have served as pillars supporting our inter-American system. There is no serious question as to whether our present policies in the economic field will be effective in contributing enormously to our inter-American goal of establishing strong and self-reliant economies—the kind that make a real, measurable difference in the way our people live. The great question is as to whether we can in fact adhere to these policies. They are not easy of accomplishment. They require some sacrifice and some self-discipline from all of us in the hemisphere. They have at times proved more controversial here at home than the kind of aid program principally significant because of its dollar cost to the Treasury. These policies are aimed squarely at the basic needs of the American Family of nations—stable and expanding markets, access to sound development loans, technical assistance, and reliance on enlightened private enterprise rather than its replacement by government in business. Here and abroad they have met opposition. They are opposed by those who, despite the disastrous results of experiments elsewhere in socialism, would have us follow that course in this hemisphere. As is only natural to expect, a policy of protecting and expanding existing levels of inter-American trade has met with strong opposition from affected interests here and elsewhere in the hemisphere.

We can successfully defend these policies only if our people understand this crucial importance. At stake are the political, military and economic security of our twenty-one American Republics. If we as a people and we as a government find that we have the strength loyally and fairly to adhere to these policies, then truly we may view the future of this hemisphere with considerable confidence; for we shall stand at the threshold of a time of great progress, one which will make of these lands a better inheritance for our children and make us deserving of their gratitude.

John Marshall

(Continued from page 702)

leading to inevitable destruction of the Union.

The future strength of the federal judiciary was heralded in the first case in which Marshall sat, *The Amelia*. Instead of having each member of the Court give an opinion, the Chief Justice himself gave the opinion of the Court, thus impressing the nation with the unanimity of its highest tribunal.

At the same time Jefferson was determined to destroy the judges appointed by Adams under the Judiciary Act of 1801. The judges before whom had been tried the successful prosecutions under the Sedition law were to be the earliest victims. First on the list of Jefferson's *bêtes noires* was Samuel Chase, Maryland signer of the Declaration and Justice of the Supreme Court. He had presided at the trial of the pamphleteer Callender, where he ridiculed the defense lawyers, he had denounced Republican doctrines in his charge to a Baltimore grand jury and had excited odium against the Government. In 1802 the Judiciary Act was repealed and the June term of the Supreme Court abolished.

It was in this atmosphere that the case of *Marbury* v. *Madison* arose. William Marbury, of Alexandria, one of Adams' appointees to the post of justice of the peace, whose appointments had been confirmed by the Senate and whose commissions had been signed and sealed, but not delivered prior to March 4, 1801, was one of seventeen from whom Jefferson ordered Madison to withhold the commissions. Marbury and three others sought a mandamus to compel Madison to deliver their commissions. The remaining thirteen appointees did not consider the office worthy of litigation; in fact, several who had received their commissions resigned or refused to qualify.

The case was pending in the February term of 1803 and as a warning, Judge Pickering of New Hampshire, who had become insane, was impeached. The Republicans expected Marshall to order Madison to deliver the commissions. The inability of the Court to enforce its order was to be a sign of its impotence and possibly the prelude to Marshall's impeachment.

The Chief Justice disappointed the expectations of his enemies by deciding *first*, that the delivery of the commissions was not necessary to complete the appointments; *secondly*, that Madison's failure to deliver the commissions was a violation of the appointees' rights; *thirdly*, that Section 13 of the Judiciary Act of 1789 was unconstitutional in conferring original jurisdiction upon the Supreme Court to grant the writ of mandamus; and, *fourthly*, that it is the duty of the Supreme Court to invalidate acts passed by the Congress and signed by the President if in conflict with the Constitution.

Eternal strength was given to the

Court by this decision. It was followed by the feeble and vicious pushing of the prosecution against the unfortunate Judge Pickering. He was of course unable to appear at the trial. His son's request that evidence of his insanity be admitted was overruled. On March 12, 1804, he was found guilty of high crimes and misdemeanors. Within an hour Samuel Chase was impeached.

The trial of Chase was the American equivalent of the trial of Warren Hastings. The old Senate Chamber was fitted with an additional gallery and boxes which were occupied by the most prominent men and women of the Capital. Aaron Burr, fresh from his duel with Hamilton and under indictment in New York for issuing a challenge and in New Jersey for murder, but momentarily showered with favors by Jefferson, presided. His elegant appearance and gracious manners contrasted with the massive, gouty and florid defendant to whom the name "Bacon face" had been accorded by the Maryland Bar.

The defense lawyers were Joseph Hopkinson, of Philadelphia, Philip Barton Key, Robert Goodloe Harper, Charles Lee and, greatest of all, Luther Martin. The legal point principally stressed was whether Chase's conduct to be impeachable must be indictable. John Randolph opened for the prosecution. He charged the defendant with outrageous judicial tyranny. He contrasted his conduct in the prosecution of the scribbler Callender with Marshall's in the trial of the counterfeiter Logwood. He ridiculed the assertion that an act to be impeachable must be indictable, adding, "Where? In the Federal Courts? There, not even robbery and murder are indictable."

The Callender trial was described by numerous witnesses. Chase called a defense motion a "non sequitur, sir", and accompanied his remark with a bow that amused the spectators. Marshall testified he thought he had heard the Court refer to defense counsel as "young man".

Luther Martin began with a statement of the constitutional grounds for impeachment: "treason and bribery", both indictable, and "other high crimes and misdemeanors", obviously intended to be indictable. If Chase had "used unusual, rude and contemptuous expressions" as the impeachment charged, this was "rather a violation of the principles of politeness, than the principles of law; rather the want of decorum, than the commission of a high crime and misdemeanor".

The bow of Chase, Martin laughed away as a monstrous offense. "As bows", said he, "according to the manner they are made, may convey very different meanings", the witness who told of it should have given "a facsimile of it". Then the Senate could fairly have judged of the "propriety of the bow". Chase's other grave offense was calling William Wirt "young gentleman" in spite of the fact "he was actually thirty years old and a widower". Perhaps Chase did not know of these circumstances. "Still if he had, considering that Mr. Wirt was a widower, he certainly erred on the right side in calling him a *young* gentleman".

When the laughter from such sallies subsided, Martin became all seriousness. The case he pointed out was not merely that of his personal friend, but it was of greatest importance to all Americans then living and to posterity. "Our property, our liberty, our laws can only be protected and secured" by judges not fearful of their independence.

After the other counsel and prosecutor had been heard, John Randolph closed for the managers of the prosecution. He contrasted Chase's violence with the ideal judge's conduct, and then gave instances of Marshall's impartiality and even-handed justice. But all was unavailing. Chase was found not guilty on all eight counts—on one unanimously. With this failure, all hope of mass impeachments came to an end.

The Trial of Aaron Burr . . . *An Interesting Background*

Beveridge next turns to the greatest American criminal trial, that of Aaron Burr. As usual he provides a most interesting background. Burr is shown as a talented and charming lawyer, a fearless politician once within a step of the Presidency, then cut off from party rewards by his refusal to vote for the repeal of the Judiciary Act of 1801, and finally ruined by the results of the Hamilton duel, under indictment and without practice or office when his term as Vice President ended in 1805.

The possibility of dividing the expanding United States was at this time hoped for by Britain and by Spain. Research among diplomatic papers by Henry Adams when in England during the Civil War has proved that James Wilkinson, Commander of the United States Army, was receiving a pension from Spain and that Burr attempted unsuccessfully to get one from England. At the same time Burr prepared for what was considered the inevitable war between the United States and Spain. He chose General Wilkinson as an associate of a group engaged in a land development plan, intending to attack Mexico if the expected war materialized. It was for this plan also that he hoped to get English gold.

To reconnoiter the land, Burr now visited Andrew Jackson in Tennessee. He was enthusiastically received by those who longed to wrest Texas and Mexico from the crumbling Spanish Empire. Later he was given an ovation in New Orleans and offered help by the Catholic bishop and the superior of the Ursuline nuns. He returned to Kentucky and fascinated Henry Clay as he had Clay's future enemy, Jackson.

Meanwhile rumors developed that Burr wished to lead a separatist movement of the western states. Wilkinson prepared to abandon him. "General" Eaton, the disappointed would-be Tripoli King-maker, about this time reported to Jefferson that Burr was planning a western insurrection. He went into greater details with members of Congress. All the while he was trying to be paid by Congress for his expenses in his attempt to replace the usurping ruler of Tripoli (which had declared war

on the United States) with his older brother. A Colonel George Morgan, also seeking favors of Congress in connection with land transactions, likewise was the source of another warning to Jefferson. A visit to Harman Blennerhassett at his island in the Ohio River was followed by the purchase by Burr and Blennerhassett of the Bastrop grant, several hundred thousand acres on the Washita River in Northern Louisiana. Unfortunately the visit coincided with a series of letters published by Blennerhassett advocating western separation from the Union. Though mere repetitions of similar articles from New England papers and little noticed at the time, they provided confirmation later of designs attributed to Burr.

Joseph Hamilton Daveiss, Marshall's brother-in-law, and United States Attorney for the District of Kentucky, also wrote Jefferson about Burr's supposed conspiracy. Jefferson gave no credence to his letters. Daveiss then made an abortive attempt to have Burr arrested. Burr appeared voluntarily with Henry Clay as his lawyer, was interviewed by the grand jury and discharged, to the delight of the people. He then continued his plans to settle the Washita River lands.

Wilkinson, in a letter to Jefferson intended to bolster his own reputation, charged Burr with treason. He sent the President a copy of Burr's cipher letter to him, omitting the opening sentence which showed Burr was replying to a communication from Wilkinson himself. Jefferson proclaimed the conspiracy and Burr's guilt on November 27, 1806, and urged all to detect and seize the conspirators. Wilkinson arrested many prominent persons, all of whom were ultimately released. The grand jury in Mississippi released Burr; that of Louisiana condemned Wilkinson's lawless acts. Yet Burr fleeing from fear of assassination was finally arrested. He was taken to Richmond by a mounted guard through the backwoods lest the legal authorities of the more settled parts of the country release him. In Richmond, Marshall signed the warrant which handed Burr to the civil authorities as he had long demanded. Upon a hearing on April 1, 1807, to commit Burr for treason and high misdemeanor, the Chief Justice found no evidence of treason. But some evidence of an attempt to attack the Spanish Colonies compelled him to hold Burr on the lesser charge. He was, however, released on bail.

The next session of court convened on May 22. The choice of the grand jury was difficult in the excited state that then prevailed. Finally a jury was chosen, headed by John Randolph and consisting also of James Pleasants—Jefferson's first cousin—and fourteen others. Burr's counsel were Edmund Randolph, John Wickham, Benjamin Botts, John Baker and the irrepressible Luther Martin. The prosecution consisted of George Hay and William Wirt, lately defense counsel in the Callender case, and Alexander MacRae.

Hay moved that Burr be committed for treason. Marshall ruled that the Court had the power to commit and should exercise it upon proof. But as proof of any overt act seemed not forthcoming and General Wilkinson did not appear, a compromise was arrived at by which Burr gave additional bail. While awaiting the General's appearance, Marshall ruled that a *subpoena duces tecum* could be served against the President of the United States so Burr could see the Wilkinson letter to him. The General strutted into the Court "swelling like a turkey cock", reported Washington Irving to one of the New York papers. He emerged from the grand jury, now also in session, having failed to be indicted himself by a vote of only nine to seven. In particular he had revealed the original of Burr's letter to him. This betrayed the omissions and downright changes in the copy he sent to Jefferson. Nonetheless, Burr and Blennerhassett were on June 24 indicted for treason in having levied war on the United States and for the misdemeanor of setting on foot an expedition against Charles IV of Spain. (Article III, Section 3 of the Constitution, provides that "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them Aid and Comfort", —proof of which by two witnesses or confession in open court is required.)

The trial opened on August 3. The Government relied upon a statement by Marshall in the trial of two of those arrested by Wilkinson, that "if war be actually levied, all who perform any part, however remote from the scene of action and who are actually in the conspiracy, are to be considered as traitors", *Ex parte Bollman and Swartwout.* A loose construction of this language had been responsible for the grand jury's indictment in the first place. But the government witnesses were unable to show that Burr was at the scene of the "war" and the prosecution conceded he was not in fact there. The "war" was most vaguely described as the buying and preparing of arms, boats, provisions at Blennerhasset's Island. The prosecution had also conceded it had no further testimony to prove an overt act.

On a motion that since no overt act was proved, collateral testimony could not be received, the principal decision of the case was made. Marshall said the doctrine of constructive treason was expressly excluded from the Constitution. Under it a traitor must perform a part in the prosecution of the war and also be a part of the conspiracy. Hence collateral testimony really intended to prove the British theory of constructive participation by Burr in the activities at Blennerhasset's Island or to corroborate the unproved overt act would be inadmissible. On this state of the evidence, the jury found Burr not guilty of treason. After a painful effort to force the misdemeanor case, that was disposed of by a nol. pros.

The Court Vilified . . . *Its Prestige Enhanced*

The vilification and burnings in effigy, which followed the trial, in the

end redounded to the credit of the Supreme Court by increasing its prestige as a tribunal not to be swayed by the clamor of politics. The preliminary and subsidiary cases and the case of Burr himself may be found in Federal Cases under the number 14,692 and following. The extraordinarily learned and able arguments are found in full in Robertson's *Trials of Aaron Burr* (Philadelphia, 1808). Ingeniously pieced together as Beveridge's work is, he cannot because of their length do justice to them.

Another example of the Court's rising above the violent feelings engendered by political passions soon followed. The State of Georgia through corruption of the legislature sold 35,000,000 acres of land for less than 1½ cents per acre. Innocent purchasers bought from the original buyers. Then the Georgia legislature purported to rescind the sale. In a suit to test title, the Supreme Court held that corruption does not invalidate legislation, that a bona fide purchase for value cuts off equities arising from fraud, but above all that a state cannot pass laws impairing the obligation of its contracts. Ultimately, the Yazoo lands were conveyed to the United States which reserved sufficient land to protect innocent purchasers. The Yazoo scandals in the end, therefore, injured no such purchasers, and as acted on by the Supreme Court, showed the power of declaring state legislation invalid and demonstrated the effectiveness of the Constitution.

A new period in American history had meanwhile developed as a result of the intensification of the struggle between France and England. American shipowners were victimized by both contestants. But Federalist New England still favored England. Jefferson's embargo of 1807 ruined him and other Southern farmers who could not because of it export their crops. But the "Force Act" of 1809 which injured shipowners, mainly Northern, was defiantly resisted. In *United States* v. *Peters,* Marshall declared that the timorous Pennsylvania Judge, Peters, must carry out the order of the Supreme Court. This he had failed to do in a case where the state legislature declared the Supreme Court had usurped jurisdiction. Luckily, President Madison was able to persuade Pennsylvania to do no rash deed injurious to the standing of the national Court.

But the New England states threatened secession when war with England came. The Federalists wished to run Marshall for President in 1812. He was closely in touch with the peace party. Yet he was on the Vigilance Committee of Richmond. And he also headed a committee to survey the rivers of the state which might be used for a canal system leading to the West.

The collapse of American shipping was forcing the settlement of the West. The New Orleans defeat, by the westerner Jackson, of the British led by the brother-in-law of the Duke of Wellington, Sir Edward Pakenham, fired the imagination of the Americans. The West seemed a land of dreams come true. With the Western spirit, despite the nationalism brought forth by the war, came an independence which increased States' Rights feelings and other manifestations of localism.

These new ideas furnished Marshall with problems for the remaining twenty years of his life. New appointments had made the Supreme Court Republican in feeling. Yet the new appointees, led by Story, supported the views of the Federalist Chief Justice and helped forge a strong national government.

Marshall at the same time was laying down principles of international law still basic in the international policies of the United States. The case of *The Nereid* established the view that enemy vessels do not make neutral cargo subject to hostile seizure. In the description of this case, Beveridge ransacks the letters of the period to paint an adequate portrait of Maryland's second greatest lawyer, William Pinkney. This bulky person wore corsets, used cosmetics and dressed in a manner which would have been considered foppish in a much younger man. He seemed inattentive and restless until his time came to address the court. Then in a manner unceremonious to his fellow counsel as well as his opponents, he sprang into action. His unmelodious voice was quickly forgotten as he poured out his accurate and discriminating legal learning copiously and with marvelous precision.

Marshall in 1819
Three Great Decisions

In preparation to discussing Marshall's three great opinions of 1819, Beveridge gives a characteristically complete and readable chapter on the financial and moral chaos of the post-war years. The Charter of the Bank of the United States was about to expire. This institution founded on the recommendation of Hamilton had well served the nation. It had without charge acted as the Government's fiscal agent and had kept paper money on a non-fluctuating specie basis. Theorists abhorred it, however, as a monopoly; jingoists as being controlled by British stockholders and the state banks for being the government depositary, conservative and successful. When the Charter was not renewed, an orgy of speculation based on paper money of unknown state banks, often selling at huge discounts and sometimes counterfeit, developed. By 1816 a new Bank of the United States had to be chartered. But it too followed the trend for a while. When it belatedly attempted to put its affairs in order, the foreclosures and bankruptcies that followed raised again a cry against the national banks. To protect the state banks, legislatures laid taxes on their hated rival.

The first important case to arise from the financial situation was *Sturges* v. *Crowninshield,* the first also of three constitutional landmarks set up in the year 1819. The case involved a suit on two notes executed just before the passage of a New York statute which discharged the obligations of insolvent debtors. Marshall's opinion held that the Constitution's empowering

of Congress to pass uniform laws on bankruptcies was superior to a conflicting state law and that the New York statute impaired contracts and so was void for that reason too.

The next great decision of the year was the *Dartmouth College* case. The attempt of the New Hampshire legislature to alter radically the colonial charter of the college was held ineffective as impairing the validity of a contract, for such the charter was declared to be. Webster's argument and its highly emotional conclusion are well described, together with that of his associate, Joseph Hopkinson. When those favored by the legislature felt their case might be saved, they employed William Pinkney to move for a reargument. But on the opening day of the February Term, Marshall read the Court's opinion in the presence of Pinkney in court to make his motion. The opinion strengthening the idea of the obligation of contracts helped the financially distracted country back to the essentials of sound business upon which the future economic greatness of the nation was built.

The third of the great decisions of 1819 was made in the case of *McCulloch* v. *Maryland*. This involved a suit by the Treasurer of the Western Shore of Maryland against the cashier of the Baltimore branch of the Bank of the United States for a tax payable under a Maryland statute. Webster, Pinkney and William Wirt represented the bank, Luther Martin, Joseph Hopkinson and Walter Jones, the State of Maryland.

Seemingly the main question was the constitutionality of the Maryland statute. The eminent counsel for the bank made it plain that the very existence of the national government was at stake. The oft-repeated charge that the Constitution created no powers by implication was given its conclusive answer in Marshall's decision. And his much quoted statement that the power to tax is the power to destroy summarized his holding that a state government may not interfere with a federal agency.

The argument of Pinkney lasted three days. It was the crowning masterpiece of one whom Marshall called "the greatest man he had ever seen in a court of justice". Marshall's opinion, says Beveridge, carried him "to the loftiest heights of judicial statesmanship". The rage of the South knew no bounds. For Southerners read into the opinion the implied power to exclude slavery from new states.

The trifling amount involved in *Cohens* v. *Virginia,* a hundred dollar fine, did not prevent that case from being of great constitutional importance. The Cohens had violated a Virginia statute in selling Washington lottery tickets in Norfolk and were fined by the local court. They brought a writ of error to the Supreme Court through a bevy of lawyers headed by Pinkney. Senator James Barbour for the State of Virginia argued against the Court's right to pass on decisions of state tribunals. Marshall's opinion approved the action of the Virginia court. But he once more made it plain that any case involving a federal law may be finally passed on by the Supreme Court.

The threats of war first heard in the Kentucky Resolutions, and then in New England hostility to the Force Act of 1809 were now loudly uttered. In such an atmosphere Marshall's decision in the *Ohio Bank* case calmly reaffirmed the principles of *McCulloch* v. *Maryland*. His action caused anger, but showed the strength of the national government. Shortly afterwards, the only overwhelmingly popular decision of the great Chief Justice's career, was made in *Gibbons* v. *Ogden*. It restored the popularity of the Supreme Court by showing its invariable impartiality.

Beveridge's account of *Gibbons* v. *Ogden* begins on the banks of the Seine in Paris on August 9, 1803. Robert Fulton was demonstrating his steamboat to a skeptical group of members of the French Institute, gathered at Napoleon's command. The American minister, Robert R. Livingston, was also present. Unlike the French observers, he had been greatly impressed with Fulton's ideas for years. Subject to much legislative laughter, he had obtained from the New York legislature an exclusive monopoly to operate the waters of the state for twenty years if within one year he could build a ship capable of making four miles an hour against the current of the Hudson. This was extended from time to time until a satisfactory vessel finally gave Livingston his monopoly.

Aaron Ogden bought from the monopoly the right to operate a ferry from New York to New Jersey. Thomas Gibbons, with no more authority than a coasting license from the United States, ran a rival line. Ogden enjoined Gibbons from interfering with his monopoly. Gibbons was defeated in his appeal to the New York Court of Errors. In the Supreme Court various delays prevented the case from being heard for four years.

During those four years localism continually attempted to support monopoly. But the economic pressure for competitive transportation was too strong. Gibbons was in 1824 represented by Daniel Webster and William Wirt. Marshall followed their argument in his opinion against Ogden. Under his coasting license, he held, Gibbons could navigate between the ports of various states. The federal enactment authorizing licenses transcended the acts of the state legislatures when interstate commerce was involved. This is the clear meaning of the interstate commerce clause, the narrow construction of which would completely defeat the purpose of the Constitution, and "leave it a magnificent structure indeed, to look at, but totally unfit for use". The supremacy of Congress over interstate commerce under Marshall's pronouncement destroyed a thousand and one complex, overlapping and mutually contradictory local laws. Without it the United States would have been as incapable of becoming economically great as France would have without the unifying force of the Code Napoleon.

An equally important case along the same line of thought as *Gibbons* v. *Ogden,* followed three years later, *Brown* v. *Maryland.* In that case, the predecessors of Alexander Brown & Sons, then still largely importers, were indicted for selling foreign goods without a license, as required by a Maryland statute. William Wirt and Jonathan Meredith represented the Browns. The State of Maryland was represented by one of the coming legal lights, its attorney general, Roger Brooke Taney, and the still more youthful Reverdy Johnson.

Marshall declared the Maryland statute a direct violation of the constitutional prohibition against taxing imports or exports. He also held that the commerce clause was violated by Maryland's attempt to attach conditions to the right of sale acquired through payment of the tariff on the imported goods in question.

This was the last of Marshall's epoch-making decisions. His final years witnessed Andrew Jackson's assault upon the Bank of the United States which produced the panic of 1837 after Jackson was safely out of power and after Marshall's death. Although Jackson put down nullification, his contempt of the Supreme Court did much to foster the spirit of rebellion against the Federal Government, and thus to prepare for the Civil War which he too was not to live to see.

All of this was anticipated by Marshall. His last years were saddened by the death of his wife as well as his apprehensions for the future of the country which he, more than any one except Washington, had made a great nation. He died in Philadelphia on July 6, 1835.

Beveridge won the Pulitzer prize for his biography and started to work on a life of Lincoln. But he died in 1927, leaving this his greatest ambition unfulfilled. He thereby repeated the pattern of frustration which followed all of his life work except his classic on John Marshall.

Administrative Law

(Continued from page 708)

courts. While it is not doubted that the members of the Commission strive earnestly and conscientiously to learn all they can about each case in which they vote (in fact, various other devices are employed toward this end, not mentioned in the above rough outline of the Commission's procedure—such as specific staff studies based on notes taken by the Commissioners on oral arguments), yet it is easy to understand that it must necessarily occur that

> In many cases a commissioner votes for a certain decision handed to him, not because he has exhaustively considered it, but because five or six advisers who have looked at it each give it his individual O.K.[11]

As in the case of the other agencies, it appears that the detailed task of reading and appraising the evidence must necessarily be delegated to staff assistants, with the members of the Commission sitting in review of their decisions. Again, the question occurs whether we would not more closely satisfy the philosophy of the *Morgan* case[12] if this necessary bifurcation of functions were frankly recognized; if the decision made by the hearing officer who originally presided at the trial were accorded the same status as that given the decision of a trial judge, with appeal to the Commission limited in scope to that of an appellate proceeding.

The decision-making processes of the Federal Communications Commission were altered as a result of an amendment to the Communications Act[13] adopted in 1952. This amendment apparently resulted from the wide publicity given to certain critical appraisals of the agency's adjudicatory procedures. A comparison of the practices before the 1952 amendment and the procedure enjoined by that amendment is, therefore, revealing.

The methods employed shortly after the adoption of the Administrative Procedure Act[14] were described in a staff report of the first Hoover Commission.[15] The agency staff prepared a memorandum, or "flimsy",

11. From an article by Mr. John S. Burchmore, 19 I.C.C. PRACTITIONERS JOURNAL 138 (1951).
12. 298 U.S. 468, 56 S. Ct. 906 (1936).
13. 66 Stat. 712, 47 U.S.C. §155.
14. 60 Stat. 237, 5 U.S.C. §1001.
15. Commission on Organization of the Executive Branch of the Government. Committee on Independent Regulatory Commissions. Staff Report on the Federal Communications Commission, prepared by William W. Golub, 1948.

on each case scheduled for decisional meetings of the Commission. The "flimsy" set forth, principally, the type of matter involved, a brief description of the origin of the case; the action recommended by the staff; a statement of the relevant facts and other considerations underlying the staff recommendation; and a proposed formal order.

The above cited staff report stated that adequate preparation by the Commissioners was a virtual impossibility, because of the sheer volume of agenda material. To read carefully even the "flimsies" pertaining to any week's meetings would involve, it was estimated, close to two days' work. It was concluded that the approach followed by the Commissioners at that time was to glance over the agenda material and to devote as much time as possible to what appeared to be the more important matters, hoping to achieve some familiarity with the bulk of the agenda and perhaps a somewhat better grasp of the major problems to be presented to the Commission.

Speaking on the same subject, Louis G. Caldwell said:

> . . . The tremendous records that are piling up daily are not read by the commissioners. Many of the briefs are not read. All they hear is a twenty-minute argument or so about the case, that is, as far as the parties directly are concerned.[16]

Charges that the members of the Commission were required to decide cases without having had the advantage of looking over the evidence were also made at hearings before congressional committees in 1949.[17]

In the amendments which followed in 1952,[18] Congress undertook to give the members of the Commission greater opportunity to familiarize themselves with the contents of the records in pending cases, by providing for the appointment of legal and engineering assistants by each Commissioner to perform such duties as the Commissioner shall direct. Their primary task is to aid the Commissioners in assimilating information as to the details of pending cases. In addition, the amendments created a "review staff" whose sole function is to assist the Commission in adjudicatory cases by preparing a summary of the evidence presented at the hearing, and also preparing (prior to oral argument) a compilation of the facts material to the exceptions filed by the parties, and by preparing for members of the Commission, without recommendation and in accordance with specific directions from such members, memoranda, opinions, decisions, and orders.

These amendments attempt to shift primary responsibility for mastery of the record from staff assistants to the members of the Commission itself. But the elaborate provisions for staff assistance bespeak eloquently the continuing need for heavy reliance on the work of these assistants. Would it not be wiser to relieve Commission members from the burden of striving to assimilate, more or less at second hand, the factual details of each case; and to permit the hearing officers to make the decisions, reserving to members of the Commission the sort of supervisory control exercised by members of an appellate judicial body? If this were done, findings on matters of fact would be made by the very officers who had actually heard the evidence and seen the witnesses; and the energies of the Commission members could be concentrated on other broad and important questions.

Conclusions

Despite variants in matters of mechanical detail, the procedure of the several agencies discussed above exhibits great uniformity of pattern. When an agency elects to have the record certified to it for initial decision, the recommendations of the hearing examiner (the one officer who has had the intimate knowledge of the case that can come only by participating in the trial itself) are necessarily relegated to a subordinate position. The assumption by the agency of the power to make the initial decision presupposes that the agency will somehow examine the entire record and base its decision thereon, using the trial examiner's recommendations only as a guide. But since members of the agency do not have time personally to examine the record, they must rely on staff assistants to evaluate the testimony, study the briefs of counsel, and appraise the merit of the exceptions and proposed findings filed by coun-

16. "Federal Administrative Procedure Act and the Administrative Agencies," a report of a symposium conducted by New York University School of Law, 1947, page 113.
17. U.S. Congress. Senate Committee on Interstate and Foreign Commerce. Amendments to the Communications Act of 1934: Hearings, 81st Congress, 1st Session, 1949, pages 54-59.
18. Sec. 5(c), Communications Act, 66 Stat. 712, 47 U.S.C. §155.

sel for the parties. Obviously, much depends on the work of the staff assistants. Their memoranda and recommendations, frequently, control the final result.

The preparation of these staff reports and proposals for decision seems to be the very crux of agency adjudication; and it is at this point that counsel for the parties could make their most effective contributions to the process of decision. But unfortunately it is impossible for counsel to achieve any effective participation in this important function. Not even the identity of the staff members is known. They work in silent isolation. As they read what are familiarly called the cold pages of the printed record, they may obtain an impression quite different from that which would have been obtained had they heard the witnesses. An ambiguous answer may be misunderstood. An obscurely phrased point may be overlooked. If these mistakes occur, there is no way of correcting them. Counsel cannot say, "Mr. Legal Assistant, I think you have overlooked the significance of the testimony at page 67"; or "No, you misunderstand my point. What I mean to say is. . . ."

On the contrary, the staff digests, reports and recommendations are kept secret from counsel. When the case is argued before the members of the agency, counsel are in the anomalous position of being required to address their arguments to the published report of the trial examiner, while the members of the agency are addressing their attention to the secret report of the staff assistant—which is presumably quite a different document. While counsel are arguing that the hearing officer erred, the members of the agency are trying to decide whether their staff assistants erred—quite a different question, and one on which counsel are unable to be of any assistance, because they do not know what the staff assistants have said.

It would be of considerable help if the memoranda prepared by the anonymous staff assistants were made available to counsel for the parties. Then, if counsel believed that such memoranda contained significant errors or omissions, they would have an opportunity to point this out to members of the agency.

Still better, the agencies might adopt the practice of submitting to counsel the agency's proposed findings of fact, conclusions of law and proposed order, and according counsel an opportunity to present arguments thereon to the members of the agency. This would enable counsel to address themselves directly to the agency members with respect to the very heart of the case, dealing in detail with the particular aspects of the case with which the agency members were most concerned (a matter which, as things now stand, counsel sometimes never can discover until it is too late). In such presentation, counsel could cite the controlling passages of the transcript for personal perusal of the agency members.

This is essentially the approach adopted in the Model State Administrative Procedure Act, promulgated by the National Conference of Commissioners on Uniform State Laws. It requires that whenever in a contested case a majority of the members of the agency who are to render final decision have not heard or read the evidence, the decision (if adverse to a party to the proceeding other than the agency itself) shall not be made until a proposal for decision, including findings of fact and conclusions of law, has been served upon the parties, and an opportunity has been afforded each party adversely affected to file exceptions and present argument to a majority of the officials who are to render the decision, who then shall personally consider the whole record or such portions thereof as may be cited by the parties.

But are not all these alternatives mere palliatives? At best they are designed to alleviate the difficulties that necessarily result when the initial decision is made by men who have not had the privilege of learning the case first hand, by presiding at the hearing itself, listening to the witnesses, and engaging in colloquy with counsel as the important points of the case are developed.

Instead of seeking to alleviate the difficulties, why not eliminate them? They would disappear completely, once the practice was abandoned of having the case "initially decided" twice—first by the hearing examiner and the second time by the somewhat weird process commonly called institutional decision, employing the combined talents of commissioners and assistants.

This duplication of effort is unnecessary and wasteful. It could be eliminated by statutory enactment providing that there should be but one initial decision. It should be made by an independent hearing officer, owing no especial allegiance to the agency. His decision would stand as the final administrative decision, except that opportunity would be afforded for review by the members of the agency itself on assignments of error: These could be utilized to raise: (1) questions whether the findings of fact were clearly erroneous, or without support in the evidence; (2) questions of law; and (3) perhaps questions of policy reserved to the discretion of the agency.

This approach, it is submitted, would more fully satisfy the spirit of the *Morgan* rule, that he who decides the case should hear the evidence; furthermore, it would enable the agency members to devote their time more fully and effectively to their primary responsibilities.

Judicial Standing in Subsidy Cases

(Continued from page 721)

of course was subject to this program, it was held to have the right to challenge its exclusion from the related meat subsidy plan.

The latest illustrative case is *Miller* v. *United States,* 124 F. Supp. 203, 23 L.W. 2162 (W. Mo. 1954). In that case a suit was brought by a soldier's widow to recover a $10,000 indemnity accorded him by the Servicemen's Indemnity Act of 1951.[25] The Government challenged the jurisdiction of the district court on the ground that the insurance afforded under the Act was a "gratuity" which could be granted or withheld in the exclusive discretion of the Administrator of Veterans Affairs. Rejecting this argument in decisive terms, District Judge Whittaker declared: "Upon first reading, this position shocks the conscience. Further study of the law has not changed my first impression. Servicemen who lose their lives in the service of our country and the families of these men, are not the discretionary cestuis of a beneficent Veterans Administration, but rather are the beneficiaries of a grateful America, whose Congress, by the adoption of Subchapter II of Title 38, U.S.C., gave them a vested property right in the life insurance thereby afforded." The court concluded that it had jurisdiction of the suit.

The *Ayock, Illinois Packing* and *Miller* cases involve situations in which the plaintiff has been denied a subsidy claimed to be its due. They indicate, as the quoted portions of the opinion show, that such plaintiffs will be held to have suffered a legal wrong where the claim is based on some "consideration", in *Ayock* "the numerous requirements for the naval stores operator to put himself in position to receive the payments", in *Illinois Packing Co.* compliance with "the price control program", and in *Miller* "service of our country". Of course these cases do not require the government to undertake any particular subsidy program. They hold only that obligations the government voluntarily assumes will be enforceable at the behest of any party who gives something in return for his grant.

The existence of such "consideration" in these cases is not confined to subsidy *claimants.* In some situations persons contesting a grant to others may be able similarly to premise their standing. Consider the situation of the plaintiff in the *American President Lines* case, *supra,* which was challenging a subsidy grant by the Federal Maritime Board to two of its competitors. Plaintiff in that case itself was the recipient of the same type of operating subsidy which the Board proposed giving to its competitors. It claimed that its own subsidy contract set up "a rigid and closely regulated steamship service, with limited profits and large commitments for capital expenditures". Accordingly it argued that "the subsidized operator has . . . an unusually heavy interest in not being subjected to excessive competition on his route". In addition, the plaintiff claimed that the subsidy it received was not a "bounty which has been [its] costless privilege to receive" but an obligation of the government which it had "bought and paid for" when it purchased the stock of the company from the United States. Certainly these contentions raised a possibility of "legal wrong" from competition differentiable from the *Alabama Power* case in which there was no claim by the private power company that the Government was impairing any assumed obligations to it. And the scope of the Government's subsidy operations makes it likely that plaintiffs similarly situated will often be available to present their legal objections to proposed grants.

Arizona v. Hobby . . . *Another Subsidy Case*

Before concluding, mention should be made of another recent subsidy case in the District of Columbia, *Arizona* v. *Hobby,* 221 F. 2d 498, (D.C. Cir. 1954). The Court of Appeals there decided that the district court was without jurisdiction of a suit brought by the State of Arizona against the Secretary of Health, Education and Welfare contesting the Secretary's refusal to approve for federal aid a state disability plan. The court, stressing the fact that the ultimate purpose of the suit was to control a disposition of government property, held that the doctrine of sovereign immunity was a bar to the action. In a footnote to the opinion, the court declared that the Administrative Procedure Act was "plainly" unavailable as a basis for jurisdiction.

No question of standing was raised in the *Arizona* case, hence a full discussion of its import is outside the scope of this article. Because all subsidy suits ultimately involve government property, however, brief comment on the court's emphasis upon this factor may be appropriate. Logically the involvement of government property appears to be almost wholly irrelevent to the question of judicial review. Certainly this is so where the Government expressly consents to be sued or where judicial review is required by the Constitution. See *West Coast Exploration Co.* v. *McKay,* 213 F. 2d 582, 596 (D.C. Cir. 1954), *cert. denied,* 347 U.S. 989 (1954), and cases there cited. No reason appears for a different analysis where such consent is implied as it would have to be in subsidy statutes silent as to reviewability. Under such statutes as the one involved in

level of maximum meat prices than otherwise would have been permissible under the Emergency Price Control Act. Meat slaughterers who qualified under the subsidy regulations thus were entitled to the subsidy as a matter of right and not of grace." See also, *United States* v. *Borin,* 209 F. 2d 145 (C.A. 5th 1954), *cert. denied,* 348 U.S. 821 (1954).

25. 38 U.S.C. § 851 *et seq.* (1952).

Arizona v. *Hobby*, the only question should be as to existence of implied consent; and as to this, it seems much more pertinent to inquire into the "history of the statute in question" and "the type of problem involved" than whether the ultimate effect of the suit is to reach government property.[26]

The legislative history of Section 10, while not always consistent, certainly indicates an intention to greatly enlarge the availability of review.[27] Particularly illuminating is the Report of the House Judiciary Committee which declares that: "It has never been the policy of Congress to prevent the administration of its own statutes from being judicially confined to the scope of authority granted or to the objectives specified."[28] Explaining, the report continues: "Its [Congress'] policy could not be otherwise, for in such a case statutes would in effect be blank checks drawn to the credit of some administrative officer or board." In subsidy cases this last comment is as figuratively true as it is literally applicable.

Unfortunately the legislative desire to enlarge the availability of judicial review is not clearly reflected in the language of the Administrative Procedure Act. Since subsidy statutes, in turn, usually are silent as to judicial review, it will be entirely up to the courts to determine the boundaries of justiciability and standing in this area. This imposes upon the judiciary an almost legislative function in which "pragmatic judgments" may be expected to play as large a role as "analytic interpretations".[29] Earlier concepts undoubtedly will continue to be relied upon, although it may be hoped that, in the spirit of the Administrative Procedure Act, the courts will be receptive to arguments enlarging their jurisdictional orbit.

The cases discussed suggest a concept of standing in subsidy cases premised on "consideration" which appears to harmonize the pragmatic judgment and traditional ken of our judges. This approach largely avoids the sovereign immunity obstacle to subsidy suits as they are regarded as coming within existing statutory provisions for contract claims against the United States. It affords some basis for expanding the jurisdiction of the courts, but it obviously will not satisfy those who thought that the Administrative Procedure Act would allow complete judicial supervision of administrative action.[30]

The tremendous power vested in administrative officials under the various subsidy programs makes essential at least a minimum of judicial protection against administrative abuses. Opportunity for the immediate beneficiaries of these programs to protect their personal interests may be the only method of vindicating the public interest in a rule of law for subsidy cases. For however sincere are the officials in charge of dispensing the Government's bounties, judicial reluctance to hear the complaints of those claiming to be unfairly treated can only invite executive arbitrariness.[31] An expansion of the concept of legal standing in subsidy cases appears necessary to insure a rule of law in this field.

26. *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297 (1943). See also, *Dismuke* v. *United States*, 297 U.S. 172 (1936); *Riverview Packing Co.* v. *Reconstruction Finance Corporation*, 207 F. 2d 361, 366-367 (C.A. 3d 1953).

27. Much of the inconsistency is the result of the interpretations of the Act given by the Attorney General. Contrast, for example, the Attorney General's conclusions reported at 92 Cong. Rec. A2984 (1946) that Section 10 "in general declares the existing law concerning judicial review," with the following colloquy at 92 Cong. Rec. 2154 (1946) between Senators Austin and McCarran, the latter the Chairman of the Senate Judiciary Committee:
"Mr Austin: Is it not true that among the cases cited by the distinguished Senator were some in which no redress or no review was granted, solely because the statute did not provide for a review?
Mr. McCarran: That is correct.
Mr. Austin: And is it not also true that, because of the situation in which we are at the moment, this bill is brought forward for the purpose of remedying that defect and providing a review to all persons who suffer a legal wrong or wrongs of the other categories mentioned?
Mr. McCarran: That is true; the Senator is entirely correct in his statement."

28. H. Rep. 1980, 79th Cong., 2d Sess. (1946), reprinted in Sen. Doc. 248, 79th Cong., 2d Sess. at 275 (1946).

29. See Davis, *Nonreviewable Administrative Action*, 96 U. Pa. L. Rev. 749, 792 (1948).

30. Under French law, review is accorded in "privilege" cases under the same conditions as apply to cases affecting personal or property rights. See Schwartz, *op. cit. supra*, note 5, at 159. Arguing for a similar practice in our courts, Professor Schwartz says: "It is unrealistic today to treat the applicant for a pension or a government contract, whose financial well-being may be wholly dependent on the government grant, any differently from one declared to be injured in his personal or property 'rights.' With regard to the availability of judicial review, is there, for example, any adequate reason for differentiating a veteran seeking a pension from an alien being deported, simply because a veteran's benefit is termed a privilege inistead of a property right? As far as the effect on the individual is concerned the veteran's pension case, regardless of the tag used, involves a need for judicial control just as great as that in any other administrative proceeding. And the same is true of other cases involving the grant of so-called privileges or benefits by the State. The power of the State altogether to deny such privileges should not mean that they can be denied by the administration to particular individuals without the latter's being entitled to judicial decisions on the legality of the denials." Ibid.

31. *Cf.* Mr. Justice Douglas dissenting in *United States* v. *Wunderlich*, 342 U.S. 98, 101 (1951), and concurring in *Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 177 (1951). See also *Fleming* v. *Moberly Milk Products Co.*, 82 U.S. App. D.C. 16, 160 F. 2d 259, 265 (C.A.D.C. 1947), *cert. dismissed*, 331 U.S. 786 (1947): "If the judiciary had no power in such matter, the only practical restraint would be the self restraint of the executive branch. Such a result is foreign to our concept of the divisions of powers of government."

Classified

RATES *20 cents per word for each insertion: minimum charge $2.00* **payable in advance.** *Copy should reach us by the first day of the month preceding month of issue. Allow two extra words for box number. Address all replies to blind ads in care of* AMERICAN BAR ASSOCIATION JOURNAL, *1155 East Sixtieth Street, Chicago 37, Illinois.*

BOOKS

LAW LIBRARIES OR LESSER COLLECtions of esteemed used law books purchased. Our 64-page printed catalog free on request lists some used law books we have for sale, also indicates the type of materials we will purchase. CLAITOR'S BOOK STORE, Baton Rouge 2, Louisiana.

BAYOU BOOK COMPANY—LAW BOOKS, used and new. Miscellany. Send wants. Box 2423, Baton Rouge, Louisiana.

EVERYTHING IN LAW BOOKS, George T. BISEL CO., Philadelphia 6, Pa.

"THE HAND OF HAUPTMANN," STORY of Lindbergh Case by Document Expert Cited by John Henry Wigmore, 368 Pages, 250 Illustrations. Price $5.00. J. V. HARING & J. H. HARING, 15 Park Row, New York 38, N. Y.

LAW BOOKS BOUGHT, SOLD, EXCHANGED. Free Catalogue. IRVING KOTHS, 516½ Main St., Vancouver, Washington.

WHEN YOU HAVE A DOCUMENT PROBlem of any kind send for "Questioned Document, Second Edition," 736 Pages, 340 illustrations, $12.50 delivered. Also "Questioned Document Problems, Second Edition," 546 Pages, $8.50 delivered. ALBERT OSBORN, 233 Broadway, New York 7, New York.

LAW BOOKS BOUGHT AND SOLD: COMplete libraries and single sets. CECIL SKIPWORTH, 306 West 1st Street, Los Angeles 12, California.

WRITE US FOR YOUR TEXT BOOK needs. Good used law books bought, sold and exchanged. (In business 47 years.) THE HARRISON COMPANY, 93 Hunter Street, S. W., Atlanta 2, Georgia.

LOWEST PRICES USED LAW BOOKS—complete stocks on hand, sets and texts—Law Libraries appraised and bought. NATIONAL LAW LIBRARY APPRAISAL ASSOCIATION, 538 South Dearborn St., Chicago 5, Illinois.

THOMAS LAW BOOK COMPANY PUBlisher, Dealers, Importers. We Sell, We Buy, We Exchange. Incorporated 1885. 209 N. 3rd, St. Louis 2, Mo.

USED LAW BOOKS AT ATTRACTIVE prices. We buy and sell either one book or a complete library. Let us quote you prices. HARRY B. LAKE, 321 Kearney Street, San Francisco 8, California.

LAW BOOKS OF EVERY DESCRIPTION bought and sold. Best prices. JOSEPH M. MITCHELL COMPANY, Philadelphia 43, Pennsylvania.

UNITED STATES GOVERNMENT PUBLIcations at regular Government prices. No deposit—Immediate Service—Write NATIONAL LAW BOOK COMPANY, 1110—13th St., N. W. Washington, D. C.

LAW BOOKS BOUGHT AND SOLD: COMplete libraries and single sets. CLARK BOARDMAN Co., Ltd., 11 Park Place, New York City.

LAW BOOKS—WE CAN SUPPLY THE FOLlowing sets at this time: U. S. Attorney General opinions, complete sets and odd volumes—Decisions of the Commissioner of Patents, complete sets or odd volumes—U. S. Supreme Court Reports complete: Law Edition.—U. S. Supreme Court Reports, Official Single Volume edition complete. —Supreme Court Reporter, complete. ALSO, the following complete Law Reviews: Notre Dame Lawyer, Marquette Law Review, Yale Law Journal, Harvard Law Review. Write us for your every law book need—DENNIS & Co., INC., 251 Main St., Buffalo 3, New York.

LAW BOOKS USED AND NEW—BOUGHT, sold, traded. Reporter System Units, American Law Reports, American Jurisprudence. Corpus Juris Secundum. U. S. C. A., Digests, all text books, etc., Appraisals free. R. V. Boyle, LAW BOOKS, Leonhardt Building, Oklahoma City 2, Oklahoma.

BOOKCASES

FREE WHOLESALE FURNITURE CATAlog. Desks, reception room chairs, etc. Write Clear-Vue Comany, 1237 Knott Bldg., Dayton 2, Ohio.

HANDWRITING EXPERTS

LUKE S. MAY CONSULTING EXPERT & Examiner of "Questioned Documents." Qualified in Military, Federal, Territorial, State and Provincial Courts, United States and Canada. Director of the Scientific Detective Laboratories—established in Seattle since 1919. Advanced Scientific Evidence Laboratories with special apparatus for the examination, analysis, identification, determination and illustrative proof of facts relating to genuine or forged handwriting, typewriting, printing, seals, etc. The detection and ocular proof of facts regarding age, alterations, additions, substitutions, etc., in all types of important suspected or disputed papers. Phone Elliott 2445, Suite 843 Henry Building, Seattle 1, Washington.

M. A. NERNBERG, EXAMINER OF DISputed Documents. Thirty years' experience. Formerly specially employed by the United States Government as handwriting expert in cases involving handwriting. 1728 Grant Building, Pittsburgh, Pa. Phone ATlantic 1-1911.

CHARLES SCOTT, DOCUMENT EXAMINer. Author; "Photographic Evidence". Written opinions all handwriting and typewriting questions. Fully equipped laboratory. Qualified witness. Nationwide experience. Commerce Trust Building, Kansas City, Missouri. Telephones: Office—VIctor 8540, residence—NIagara 3246.

BEN GARCIA, EXAMINER OF ALL CLASSes of questioned handwriting and typewriting. Qualified expert; State and Federal Courts. 13 years of experience. 805 E. & C. Building, Denver, Colorado. Phone: AComa 2-1729.

LINTON GODOWN, MEMPHIS. EXAMINER handwriting, typewriting, inks, alterations. Experienced qualified witness. Manhattan Bank Bldg. 8-4321.

DR. WILMER SOUDER, CONSULTANT. Member: American Society Questioned Document Examiners. REPORTS, EXHIBITS, TESTIMONY. 30 Years' experience in State and Federal Courts, 3503 Morrison St., N. W., Washington 15, D. C. Phone: WOodley 6-3050.

KARL SCHOTTLER, 915 CHESTNUT Street, St. Louis 1, Mo., Telephone GArfield 1-3399, Document Examiner and Handwriting Expert; Modern Laboratory; Scientific Technique in Document Examinations.

GEORGE G. SWETT, ST. LOUIS, MISsouri, 14 South Central (5) Telephone: PArkview 5-9394. Handwriting, typewriting and document expert U. S. Post Office Department 12 years. All types of document problems considered. Photographic laboratory maintained. Centrally located on major air and rail lines. Member American Society of Questioned Document Examiners.

HARRY M. ASHTON, 3601 EDWARDS Road, Cincinnati 8, Ohio. Telephone East 1-6704 Over 30 years with Post Office Department. Qualified in all courts. Completely equipped laboratory for handling all types of document problems. Member American Academy of Forensic Sciences and International Association for Identification.

HARRIS & HARRIS, 510 SOUTH SPRING Street, Los Angeles, telephone MAdison 5-1518; and 690 Market Street, San Francisco, telephone DOuglas 2-4329. Discovery and proof of facts relating to disputed handwriting, typewriting, inks and papers. Over 25 years' experience. Qualified in all courts. Members: American Society of Questioned Document Examiners.

MISCELLANEOUS

CHANCE OF A LIFETIME! REMINGTON noiseless typewriter. Modern Streamline Design—Latest Features—Original black finish. Guaranteed, reconditioned. Same machine now being sold new for $254.00. Our special price only $69.50. Circular on request. UTILITY SUPPLY CO., Office Machine Dept., 641 W. Lake Street, Chicago 6, Illinois, Department BJ.

LOOKING FOR A PUBLISHER OF YOUR legal manuscript or other work? All subjects considered. New authors welcomed. Write for Free Booklet LX, Vantage Press, 120 West 31st Street, New York.

POSITIONS WANTED

ATTORNEY, THOROUGH, HEAVY EXPErience corporation counsel, administrative executive, all phases general practice, all courts, Illinois and Florida Bars, 42, married, presently employed, desires change to large corporation or law office, will re-locate. Box 5JN-2.

TITLE EXAMINER, 42, FAMILY, B.A. LL.B., Texas license, excellent references, twelve years' oil title experience Texas and Louisiana; prefer West or Southwest. Box 5JL-3.

ATTORNEY, 28, BOSTON-KANSAS CITY, single, desires employment, corporation, law firm. Now with Kansas City law firm. Member: Massachusetts, Missouri, I.C.C. bars. B.S. (Accounting-Finance), LL.B., LL.M. in Labor Law, LL.M. in Taxation. Entire legal training at three universities financed on full tuition scholarships. Preference: Boston, NYC, Kansas City, Chicago, but best opportunity. Box 5JL-6.

ATTORNEY, 34, A.B., LL.B. (CUM LAUDE), 7 years' general practice, immediate past president of circuit bar association, member of board of governors of state bar association, especially interested in trial work, presently engaged in general practice, desires association with law firm, preferably in south. Box 5JL-9.

ATTORNEY, 34, MARRIED, B.A., LL.B. Vanderbilt, Deputy Clerk & Master Chancery Court, six years' general practice, desires association with firm or corporation. Box 5A...

U. OF CHICAGO J.D., 30, DESIRES TEACHing or association in west, southwest or Florida, 2 years' insurance, 4 years' legal experience. Box 5AG-2.

ATTORNEY—REAL, PERSONAL AND UTILity property taxes. AB and LLB, age 46. Extensive experience. Presently employed, desires relocation. Resume on request. Box 5AG-3.

TAX ATTORNEY—FIVE YEARS' BROAD experience, L.L.B. Harvard, L.L.M. Taxation, age 28, articles published. Box 5AG-4.

LAW DEPARTMENT EXECUTIVE AND OFficer of one of country's largest corporations seeks management opportunity in new or expanding corporate law department. Location secondary. Over twenty years' broad experience, including trials and labor law. Qualified to organize and administer new department. Box 5AG-5.

ROBES

JUDICIAL ROBES CUSTOM TAILORED—The best of their kind—satisfaction guaranteed —Catalog J sent on request. BENTLEY & SIMON, INC., 7-9 West 36th St., New York 18, N. Y.

SHORTHAND AND STENOTYPE REPORTING

SANSOM COURT STENOS., 154 NASSAU St., New York 38, N.Y. XsBT . . . Examinations Before Trial. Free hearing rooms . . . air-conditioned. IT'S SO EASY TO RECOMMEND US TODAY!!! You couldn't do a greater favor for your lawyer friends. Simply dial BE 3-3381 . . . and you will get an EXPERT COURT REPORTER . . . on quick notice.

SAN FRANCISCO: HART & HART (SINCE 1927), official reporters (shorthand and machines); notaries; private deposition suite; Chancery Building, 564 Market Street. References: local bench and bar.